156-211

IN THE

Supreme Court of the United States.

In the Matter of the Indictment, in the Supreme Court of the District of Columbia, under Section 102 of the Revised Statutes of the United States, of Elverton R. Chapman, for Refusing to Answer Certain Questions put to him by a Special Committee of the United States Senate.

PETITION OF ELVERTON R. CHAPMAN FOR WRIT OF HABEAS CORPUS.

SAMUEL SHELLABARGER,
JEREMIAH M. WILSON,
Attorneys for Petitioner.

Press of McGILL & WALLACE, 1107 E Street N. W.

THE LAW ASSOCIATION OF PHILADELPHIA.

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PETITION.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Elverton R. Chapman, respectfully represents:

1. That he is a citizen of the United States, a resident of the City of New York, in the State of New York, and that he is now unlawfully restrained of his liberty by the United States marshal for the District of Columbia, to wit, Albert A. Wilson.

2. Your petitioner further says that the facts concerning the said unlawful detention and imprisonment of your petitioner by the said Albert A. Wilson, United States marshal for the District of Columbia, and the claim of authority under and by virtue of which your petitioner is detained, are as follows:

(*a*) That heretofore, to wit, on the 29th day of June, 1894, in the Supreme Court of the District of Columbia holding a Criminal Term, the grand jury, impanelled in said court, at said term thereof, found, returned, and filed in said court against your petitioner an indictment ostensibly based upon section 102 of the Revised Statutes of the United States; and that, thereupon, and on, to wit, the 2 l day of July, 1894, your petitioner voluntarily surrendered himself unto and into the custody of said court, holding such criminal term as aforesaid, and then and there entered into a recognizance in the penal sum of $1,000, with Lewis J. Davis as surety, for his appearance in said court from time to time as he might thereunto be required; and thereupon, and on said 2d day of July, 1894, your petitioner filed a demurrer to said indictment.

(*b*) That thereafter, and on, to wit, the 1st day of October, 1894, in the said Supreme Court of the District of Columbia, holding a Criminal Term, the grand jury, impanelled in said court, at said term thereof, found, returned, and filed in said court against your petitioner another indictment ostensibly based upon section 102 of the Revised Statutes of the United States, which indictment, as your petitioner is informed and believes, was returned against him as a substitute for, and in lieu of, the said former indictment hereinbefore referred to; a full, true, and certified copy of which last-named indictment, so returned against your petitioner on October 1, 1894, is hereunto annexed, marked Exhibit A, and made a part of this petition.

(*c*) That afterwards, to wit, on the 11th of October, 1894, your petitioner, by his attorneys, appeared in said court, and filed in said prosecution, to wit, in the case of the United States against your petitioner, being case

numbered 19,985 on the docket of said court, a general demurrer to said last-named indictment, together with a note appended thereto, as required by the rules of said court, stating the grounds of said demurrer, and which demurrer and note thereto, by a full, true, and certified copy thereof, are hereto annexed, marked Exhibit B, and made a part of this petition.

(*d*) That afterwards, to wit, on the 17th day of November, 1894, the justice holding said Criminal Term of said court made and filed in said case an order overruling the said demurrer and requiring your petitioner to appear and plead to said indictment, a full, true, and certified copy of which said order is hereto annexed, marked Exhibit C, and made a part of this petition.

(*e*) That afterwards, to wit, on the 22d day of November, 1894, on application made to the Court of Appeals of the District of Columbia in that behalf, the said Court of Appeals allowed an appeal thereunto from the said order of the Supreme Court of the District of Columbia overruling said demurrer, a full, true, and certified copy of which allowance is hereto annexed, marked Exhibit D, and made a part of this petition.

(*f*) That afterwards, to wit, on the 30th day of November, 1894, the said appeal to the said Court of Appeals was by your petitioner duly perfected, and on the 14th day of December, 1894, the matter so carried by appeal to the said Court of Appeals was, by the attorney of the United States for the District of Columbia, in opposition to said demurrer, and by the said attorneys for your petitioner in support thereof, duly submitted to said Court of Appeals, and said matter was, by said court, taken under advisement.

(*g*) That afterwards, to wit, on the 7th day of January, 1895, the said Court of Appeals rendered its order

and judgment in said matter so appealed, and affirmed the decision of the Supreme Court of the District of Columbia overruling said demurrer and requiring your petitioner to plead to said indictment.

(*h*) That afterwards, to wit, on the 14th day of January, 1895, the said cause was remanded by said Court of Appeals to the Supreme Court of the District of Columbia holding a Criminal Term, to be there proceeded in; and said cause is now in said last-named court duly pending.

(*i*) That afterwards, to wit, on the 18th day of January, 1895, the bondsmen of your petitioner, namely, Lewis J. Davis, went into said Supreme Court, taking with him your petitioner, and then and there, in open court, at a session thereof then and there duly held, withdrew his obligation theretofore entered into as bondsman and surety for the appearance of your petitioner, from time to time in said court, and in the presence of and to the said court prayed to be released and exonerated from further obligation upon said recognizance, which was by the court duly ordered and entered of record, as appears by a full, true, and certified copy of said order, hereunto annexed and made part of this petition, marked Exhibit E; and, thereupon, in said court, and at the same time, your petitioner then being in the custody and presence of the court, the court made an order in the words following, namely:

"And the defendant, in default of other bail, is committed to the custody of the United States marshal for the District of Columbia to await further action in this case,"—

a full, true, and certified copy of which order, so committing your petitioner to the custody of said United States marshal of the District of Columbia, Albert A.

Wilson, is also contained in said Exhibit E, and is made part of this petition.

And thereupon, and in pursuance and by virtue of said last-named order, the said Albert A. Wilson, United States marshal, as aforesaid, took your petitioner into his custody, and now holds and confines him in said custody, imprisons him, and deprives him of his liberty.

3. Your petitioner further says that the said imprisonment of your petitioner, and the said deprivation of his liberty, under said alleged and pretended authority of the said order of the said Supreme Court of the District of Columbia, of which a copy is, as aforesaid, set forth herein and marked Exhibit E, is unlawful and wholly without any jurisdiction or authority in said court to make said order, and such imprisonment and deprivation of liberty is made, and now continues, in violation of the Constitution and laws of the United States.

4. Your petitioner sets forth and assigns as grounds upon which he charges that said imprisonment was and is unlawful and in violation of the Constitution and laws of the United States, and is made without any jurisdiction in said court to make said order of imprisonment, the following:

(*a*) That the questions, and each of them, put to your petitioner and set forth in said indictment, and which your petitioner declined to answer, were questions in regard to the lawful private business of your petitioner, which he was not bound to answer, and which he was protected from making answer to because attempting to make an unreasonable and unlawful search into the private affairs of your petitioner, in contravention of the provisions of the Fourth Amendment to the Constitution of the United States, and of the other provisions of the

Constitution and laws of the United States protective of personal rights and liberty; and which questions the resolution of the Senate, set forth in said indictment, under which the investigating committee received whatever authority it had in the premises to make investigations and to ask questions, did not authorize or empower said committee to ask or compel answers to.

(*b*) That the conditions under which the said questions set forth in said indictment were asked of your petitioner, and which he declined to answer, and all the other conditions herein named, were not such as authorized the said committee to make said search into the private affairs of your petitioner, nor were they such as authorized or permitted the Senate of the United States to demand or compel answers thereto disclosing the private business of your petitioner; this because, owing to the very limited jurisdiction of the Senate in matters of judicial cognizance (*103 U. S., 197*), the Senate is without power or jurisdiction to institute or compel inquiry into such private affairs, except where such inquiry is prosecuted in aid of the exercise and execution of some one or more of the judicial functions of the Senate; and the facts disclosed by the Record, hereinabove set forth, fail to show that said investigation was instituted and prosecuted for any such purpose, but show the opposite.

(*c*) Owing to, and in view of, the matters and conditions set forth in the two preceding paragraphs, the refusal of your petitioner to answer the questions set forth in said indictment is not a misdemeanor within the purview and true intent and meaning of said section 102 of the Revised Statutes; that section not being designed to, nor could it, compel unwilling answers to questions which the committee was prohibited from asking, or enforcing answers to, by the principles of the Constitution and laws of the United States.

(*d*) Section 102 of the Revised Statutes of the United States, under which this indictment was brought, is unconstitutional and void, because it is an attempt, on the part of Congress, to abdicate the functions, powers, and jurisdiction bestowed by the Constitution on the Houses thereof, respectively, to punish contempt of their authority, and is an attempt to transfer the power to punish acts constituting contempt of the Houses respectively to the exclusive discretion and jurisdiction of the Criminal Court of the District of Columbia.

(*e*) If said section 102 should receive the interpretation of not being designed to transfer to the Criminal Court of the District of Columbia the exclusive jurisdiction of the Houses of Congress to punish acts which amount to a contempt of their authority, but as being designed to leave in the Houses the power to punish such acts, and to *add* to such power to punish for contempt the power and jurisdiction in the Criminal Court of this District to punish the *same acts* as *misdemeanors*, then said section 102, for this additional reason, is unconstitutional and void, as being in contravention to the Fifth Amendment to the Constitution of the United States.

(*f*) Your petitioner here inserts, for convenience, sections 102, 103, and 104 of the Revised Statutes, which are as follows:

"102. Every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars, nor less than one hundred dollars, and imprisonment in a common jail for not less than one month, nor more than twelve months.

"103. No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact, or his production of such paper, may tend to disgrace him, or otherwise render him infamous.

"104. Whenever a witness summoned as mentioned in section one hundred and two fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact, under the seal of the Senate or House, to the District Attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

Section 102, under which your petitioner is indicted, is unconstitutional and void for the additional reason that it is inseparably connected with the provisions of section 103, and is, along with said section 103, a part of the single and indivisible scheme embraced in the act of January 24, 1857. The provisions of section 102 can not, therefore, be enforced in disregard of the provisions of section 103 consistently with the intention of Congress, and if section 103 is not capable of being executed because unconstitutional and void, then neither can section 102 be executed, because, "if a clause in a statute "which violates the Constitution can not be rejected "without causing the statute to enact what the legisla- "ture never intended, the whole statute must fail." (*118 U. S., 91.*)

The compulsory requirements of this statute of 1857, taken as a whole, and its definition of a misdemeanor, combine in one mass and without discrimination two classes of testimony, one being of a kind that the witness ought to give, and the other being one which the Constitution, in its Fifth Amendment, says he shall not be compelled to give. In such case the judiciary can not

supply exceptions which the statute does not make (*Reese Case, 92 U. S., 221*), and enforce the delivery of the class of testimony which the witness can lawfully be required to give, and leave out that class which he can not be required to give, but which comes equally within the statute.

(See the *Sprague Case, 118 U. S., 91–4–5; Reese Case, 92 U. S., 214*, and cases cited; and *Frank's Case, 120 U. S., 679, 686, et seq.*)

(*g*) Section 103 is clearly unconstitutional because it compels involuntary answers to questions put by committees of either House of Congress, although the witness may decline to answer on the ground that his testimony, in answer to such questions, or his production of papers, may tend to disgrace him, or otherwise render him infamous.

(See *Boyd's Case, 116 U. S., 616; Counselman Case, 142 U. S., 547, 580, et seq.*, reaffirmed in *Brimson Case, 154 U. S., 479.*)

(*h*) Your petitioner further says that, upon other grounds, not hereinabove enumerated, but which appear from the herein set forth and duly-certified Exhibits taken from the records of said Criminal Court, to wit, Exhibits A, B, C, D and E, your petitioner's said imprisonment and deprivation of liberty, under said order of court set forth in said Exhibit E, is made, and now continues, without any authority of law, and is made in excess of the jurisdiction of said court, and your petitioner is held in violation of the Constitution and laws of the United States.

Wherefore your petitioner prays that the writ of *habeas corpus* may issue from this honorable court, directed to the said Albert A. Wilson, United States marshal for the District of Columbia, commanding him to produce your petitioner, Elverton R. Chapman, before

this honorable court; and also, if need be, a writ of *certiorari*, directed to the Clerk of said Supreme Court of the District of Columbia, requiring him to bring into this court a full, complete and duly-certified copy of the Record of the entire proceedings in said court, in said case, Criminal, No. 19,985, against your petitioner, and in which his said imprisonment is made.

ELVERTON R. CHAPMAN,
Petitioner.

SAMUEL SHELLABARGER and
JEREMIAH M. WILSON,
Counsel for Petitioner.

DISTRICT OF COLUMBIA. } *ss:*

The undersigned, Elverton R. Chapman, on solemn oath says that he is acquainted with the contents of the foregoing petition by him subscribed, praying for the allowance and issuance of a writ of *habeas corpus*, and that he has fully read the same, and that the facts set forth in said foregoing petition are true.

ELVERTON R. CHAPMAN.

Subscribed and sworn to before me this 21st day of January, A. D. 1895.

J. R. YOUNG,
Clerk of the Supreme Court of D. C.

Exhibit A.

Indictment. Filed October 1st, 1894.

Filed in open court October 1, 1894.

Indictment.

In the Supreme Court of the District of Columbia, Holding a Criminal Term, April Term, A. D. 1894.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath do present:

That by the terms and provisions of the act of Congress approved on the first day of October, in the year of our Lord one thousand eight hundred and ninety, entitled "An act to reduce the revenue and equalize duties on imports, and for other purposes," there was imposed generally a duty of five-tenths of one cent per pound upon all sugars imported into the said United States from foreign countries, above number sixteen Dutch standard in color, that is to say: above number sixteen of a system of grading sugars in the different processes of purification and refinement, by numbers from six to twenty, according to color, and ranging from dark brown in the lower and least valuable grades to white and pure white in the higher and more valuable grades, which system was adopted in Holland many years ago, and has since been used as the basis of commercial transactions in sugars throughout the world; and which said number sixteen according to said system, is considered in such transactions as the dividing line between what are denominated as the lower grades of sugar and the higher grades thereof, and which latter grades are the ones en-

tering into common use and consumption; and that by said terms and provisions of said act, certain materials from which the higher and more valuable grades of sugar can be produced by purification and refining, to wit: all sugars graded not above said number sixteen, Dutch standard in color, and all tank bottoms, all sugar drainings and sugar sweepings, sirups of cane juice, (that is to say: sirups of cane juice produced from sugar-cane), melada, concentrated melada and concrete and concentrated molasses and molasses, so imported, were placed on the free list, (that is to say: the importation of the same from foreign countries into the said United States was permitted free from duty); and that said act provided for the issue of licenses, and for the payment by the said United States of a bounty of two cents per pound, to the producer of sugars from beets, and sorghum and from sugarcane, (that is to say, from sirups of cane juice produced from sugarcane), grown, and from maple sap produced in the said United States, testing not less than ninety degrees by the polariscope, and of a bounty of one cent and three-fourths of one cent per pound to such producer upon sugars so produced as aforesaid, testing less than ninety degrees and not less than eighty degrees by the polariscope.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: that on the first day of February in the year of our Lord one thousand eight hundred and ninety-four, and for a long period of time prior thereto, to wit: for three years next preceding said last-mentioned day, the American Sugar Refining Company, a corporation organized under the laws of the State of New Jersey, was and had been extensively engaged in the said United States, in the business of refining sugars, that is to say, in the business of producing for sale and consumption in the said United States, the said higher and more valuable grades of sugar, from the

said certain materials aforesaid, and from said sugars, produced in the said United States, upon the production of which it was provided by said act that bounties should be paid as aforesaid, and that said corporation has been since the first day of February in the year of our Lord one thousand eight hundred and ninety-four and still is so engaged in said business, and that on the said first day of February in the year aforesaid, the capital stock of the said corporation was of the par value of seventy-five millions of dollars, in shares of one hundred dollars each, and has since said last-mentioned day so continued to be, and now is of said par value; and that on the said first day of February in the year aforesaid, and during the long period of time prior thereto aforesaid, the said corporation was, and since the said last-mentioned day, has been and now is able, by reason of its great resources and the extensive manner in which it is so engaged in business as aforesaid, to control and regulate and fix the price to be paid by consumers for the higher and more valuable grades of refined sugars in the said United States; and that the said corporation by reason of the premises, realized great profits from the conduct of its said business, and that after the said first day of October, in the year of our Lord one thousand eight hundred and ninety, its said stock became and was, by reason of the premises, of a value largely in excess of its said par value, and so continued to be until the assembling of the Fifty-third Congress of the said United States, and until certain legislation was proposed in the House of Representatives of said Congress, which, if enacted into a law of the said United States would destroy the ability of the said corporation to control, regulate and fix as aforesaid the price to be paid by consumers for such higher and more valuable grades of sugar, and would greatly reduce the profits realized by said corporation from the conduct of its said business, and greatly

reduce the value of the stock of said corporation; and that such proposed legislation resulted in the passage by the said House of Representatives of the bill hereinafter mentioned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present: that on the said first day of February, in the year of our Lord one thousand eight hundred and ninety-four, the said House of Representatives of the said Fifty-third Congress passed a bill entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," which said bill became thereafter variously known as the Wilson bill and as the tariff bill, and that said bill (which will be hereafter in this presentment called the tariff bill), after it had been so passed as aforesaid, by said House of Representatives, was sent by the said House of Representatives to the Senate of said Congress for the action of the said Senate thereon, and that said tariff bill was, according to the course of business in the said Senate, and on the second day of February in the year last aforesaid, referred by said Senate to one of its committees, called the Finance Committee; and that the said tariff bill, as it so passed the said House of Representatives, as aforesaid, and was so sent to the said Senate, as aforesaid, provided for the total abolition of the duties imposed, as aforesaid, by said act of Congress, approved the first day of October, in the year of our Lord one thousand eight hundred and ninety, upon all sugars above said number sixteen Dutch standard in color, and placed the same upon the free list, together with the said certain materials from which the higher and more valuable grades of sugar can be produced, to wit: all sugars graded not above said number sixteen Dutch standard in color, and all tank bottoms, all sugar drainings and sugar sweepings, sirups of cane juice, (that is to say sirups of cane juice produced

from sugar-cane), melada, concentrated melada and concrete and concentrated molasses and molasses; and that said tariff bill as it so passed the said House of Representatives and was so sent to the said Senate as aforesaid, further provided for the repeal of so much of the said act of Congress, approved the said first day of October, in the year of our Lord one thousand eight hundred and ninety, as provided for the issue of licenses and for the payment of bounties as aforesaid, to producers of sugar from beets, sorghum and sugar cane, grown and maple sap produced in the said United States; and that the enactment into a law of the said United States of the said tariff bill, as it so passed the said House of Representatives and was so sent to the said Senate, would be greatly to the disadvantage of said corporation and would greatly diminish and lessen the profits to be realized by it from the conduct of its said business; and that in consequence of the passage of the said tariff bill by the said House of Representatives and of the uncertainty at the time of such passage, as to what action would be taken by the said Senate thereon, the value of the stock of the said corporation became and was greatly impaired and lessened for the time being.

And the grand jurors aforesaid, upon their oath aforesaid, do further present: that on the twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-four, the said Finance Committee reported the said tariff bill to the said Senate, with certain proposed amendments, which the said Finance Committee recommended should be made thereto, and that said Finance Committee in so reporting said tariff bill to the said Senate, recommended that the provision thereof by which all sugars graded above number sixteen Dutch standard in color, together with the said certain materials aforesaid, from which the said higher and more valuable grades of sugar can be produced, were placed

on the free list as aforesaid, be disagreed to by the said Senate and that in lieu thereof a provision of the tenor following be inserted, that is to say:

"All sugars, tank bottoms, sirups of cane juice or beet juice, melada, concentrated melada, concrete and concentrated molasses testing by the polariscope not above eighty degrees shall pay a duty of one cent per pound, and for every additional degree or fraction of a degree above eighty and not above ninety degrees shown by the polariscope test, shall pay one one-hundredth of a cent per pound additional, and above ninety and not above ninety-eight degrees, for every additional degree or fraction of a degree shown by the polariscope test, shall pay a duty of two one-hundredths of a cent per pound additional, and upon all sugar testing above ninety-eight degrees by polariscope test, or above number sixteen by the Dutch standard in color, there shall be levied and collected a duty of one-eighth of one cent per pound in addition to the duty imposed upon sugars testing above ninety-eight degrees; molasses testing not above fifty-six degrees by the polariscope shall pay a duty of two cents per gallon; molasses testing above fifty-six degrees shall pay a duty of four cents per gallon."

and that thereupon and upon the reporting of said tariff bill to the Senate with amendments as aforesaid the stock of said corporation became greatly enhanced in value; and that on the seventh day of May, in the year last aforesaid, certain other proposed amendments to the said tariff bill were substituted to the said Senate by an individual member of said Finance Committee and who belonged to the political party known as the Democratic party, and to which party a majority of the members of said Senate also belonged; and that said last-mentioned proposed amendments so submitted became and were known as Jones amendments, and that said Jones amendments were so submitted to the said Senate as aforesaid in pursuance of an understanding had between a majority of the members of the said Senate belonging to the said Democratic

party, and that one of the said proposed amendments last mentioned provided for the striking out from said tariff bill as it so passed said House of Representatives, and was so sent to the said Senate, of the provision thereof by which all sugars above number sixteen Dutch standard in color, together with the said certain materials aforesaid, from which the said higher and more valuable grades of sugar can be produced, were placed on the free list, as aforesaid, and that in lieu thereof a provision of the tenor following be inserted, that is to say:

"On and after January first, eighteen hundred and ninety-five, there shall be levied, collected, and paid on all sugars and on all tank bottoms, sirups of cane juice or of beet juice, melada, concentrated melada, concrete and concentrated molasses, a duty of forty per centum ad valorem, and upon all sugars above number sixteen Dutch standard in color and upon all sugars which have been discolored there shall be levied, collected, and paid a duty of one-eighth of one cent per pound in addition to the said duty of forty per centum ad valorem; and all sugars, tank bottoms, sirups of cane juice or of beet juice, melada, concentrated melada, concrete or concentrated molasses, which are imported from or are the product of any country which at the time the same are exported therefrom pays, directly or indirectly, a bounty on the export thereof, shall pay a duty of one-tenth of one per cent per pound in addition to the foregoing rates: Provided, That nothing herein contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty of commercial reciprocity concluded between the United States and the king of the Hawaiian Islands on the thirtieth day of January, eighteen hundred and seventy-five, or the provisions of any act of Congress heretofore passed for the execution of the same. That on and after January first, eighteen hundred and ninety-five, there shall be levied, collected, and paid on molasses testing forty degrees or less by the polariscope, and containing more than twenty per centum of moisture, and on molasses testing above

forty degrees and not above fifty-six degrees polariscope, a duty of two cents per gallon; if testing above fifty-six degrees polariscope, a duty of four cents per gallon;"

and that thereupon and upon the submission to the said Senate of the said Jones amendments to the said tariff bill as aforesaid, the stock of the said corporation became still further enhanced in value.

And the grand jurors aforesaid, upon their oath aforesaid, do further present: that the said tariff bill from the time it was so sent to the said Senate as aforesaid, and the said proposed amendments thereto, from the time they were so reported, by the said Finance Committee to the said Senate as aforesaid, and the said proposed amendments called Jones amendments, from the time they were so submitted to the said Senate as aforesaid, and until the seventeenth day of May in the year of our Lord one thousand eight hundred and ninety-four, were pending before and under consideration by the said Senate; and that on the said seventeenth day of May in the year last aforesaid, the said Senate passed and adopted a resolution of the tenor following, that is to say:

"Whereas, it has been stated in The Sun, a newspaper published in New York, that bribes have been offered to certain Senators to induce them to vote against the pending tariff bill;" (meaning thereby that in a certain newspaper called The Sun, published in the city of New York, in the State of New York, a statement had been printed in substance and to the effect that bribes had been offered to certain members of the said Senate by persons or corporations or on behalf of persons or corporations, the profits of whose business would be lessened by the enactment into a law of the said United States of the said tariff bill, as it was so passed by said House of Representatives, and was so sent to the said Senate, as aforesaid, for the purpose of corruptly influencing the action

of them, the members last aforesaid, in their capacities as Senators of the United States, in the mattter of legislation upon the said tariff bill, so passed by the said House of Representatives and so sent to the said Senate by said House of Representatives as aforesaid, and for the purpose of corruptly inducing them, the members last aforesaid, as such Senators, to vote against the passage by the said Senate of the said tariff bill in the form in which it had so passed the said House of Representatives and had been so sent to the said Senate as aforesaid), "and

Whereas, it has also been stated in a signed article in The Press, a newspaper published in Philadelphia, that the sugar schedule has been made up as it now stands in the proposed amendment in consideration of large sums of money paid for campaign purposes of the Democratic party," (meaning thereby that in a certain newspaper called "The Press," published in the city of Philadelphia, in the State of Pennsylvania, a statement had been printed to which the name of "Holland" had been signed, and which statement was in substance and to the effect, among other things, that the amendments aforesaid whereby it was proposed to strike out the provision aforesaid of the said tariff bill as it was so passed by the said House of Representatives and was so sent to the said Senate as aforesaid, placing upon the free list all sugars and the materials aforesaid from which refined sugars can be made, and to substitute in lieu thereof a provision for the imposition of duties as aforesaid upon the importation into the said United States of sugars and of certain materials from which refined sugars can be made, had been made up by the said American Sugar Refining Company, and that the said corporation had been permitted to dictate the said amendments, so reported and proposed as aforesaid to the said Senate, in consideration of large sums of money contributed by the

said corporation to campaign committees of the said Democratic party, to aid in the election of the candidates of said party for President and Vice-President in the last presidential campaign, and to aid in the election to the said Senate and said House of Representatives of the candidates of said Democratic party, and in the fulfillment of pledges given to the agents and representatives of the said corporation, at the time of the contribution of the sums aforesaid, that if said Democratic party were successful in obtaining control of the said Senate and House of Representatives, and in electing its candidates for President and Vice-President that no legislation injurious to the interests of the said corporation and its business should be enacted).

"Therefore, resolved, That a committee of five Senators" (meaning thereby five members of the said Senate), "be appointed to investigate these charges" (meaning thereby the said statements made in the said newspapers called "The Sun" and "The Press"), "and to inquire further whether any contributions have been made by the said sugar trust, or any persons connected therewith, to any political party for campaign or election purposes, or to secure or defeat legislation," (meaning thereby whether the said American Sugar Refining Company or any person connected therewith and acting in its behalf, or in its interest, had paid over or given any sums of money to any person or committee of any political party or organization for the purpose of aiding in the election of the candidates of any such party or organization for President or Vice-President of the said United States during the last presidential campaign, and for the further purpose of aiding in the election to said Senate and House of Representatives of the candidates of any such party or organization, and for the further purpose of securing the enactment of laws of the said United States favorable to the interests of

said American Sugar Refining Company, and for the further purpose of preventing the enactment of laws of the said United States unfavorable to the interests of said American Sugar Refining Company,) "and whether any Senator has been, or is speculating in what are known as sugar stocks, during the consideration of the tariff bill now before the Senate," (meaning thereby whether any member of said Senate had, during the period of the pendency of the said tariff bill before the said Senate, that is to say: between the said second day of February in the year of our Lord one thousand eight hundred and ninety-four and the said seventeenth day of May in the same year, and with a view to his personal gain, purchased stock of the said American Sugar Refining Company, the value of which said stock was liable to be affected and could be affected to the pecuniary advantage of such Senator, last aforesaid, by the efforts or acts of such Senator, last aforesaid,) "and with power to send for persons and papers and to administer oaths."

"Resolved, further, That said committee" meaning thereby the committee to be appointed under said resolution), "be authorized to investigate and report upon any charge or charges which may be filed before it alleging that the action of any Senator," (meaning thereby any member of the said Senate), "has been corruptly or improperly influenced in the consideration of said bill, or that any attempt has been made to so influence legislation," (meaning thereby any attempt by corrupt and improper means, such as bribing or otherwise, to influence and affect the vote of said Senate and the votes of its members in respect of the said tariff bill).

And the grand jurors aforesaid, upon their oath aforesaid do further present: that George Gray, a Senator from the State of Delaware, William Lindsay, a Senator from the State of Kentucky, Cushman K. Davis, a Sena-

tor from the State of Minnesota, Henry Cabot Lodge, a Senator from the State of Massachusetts and William V. Allen, a Senator from the State of Nebraska, were duly appointed as such committee under said resolution, and of which said last-mentioned committee, the said George Gray was made chairman; and that in the issue of the said newspaper called "The Press" of the fourteenth day of May in the year of our Lord one thousand eight hundred and ninety-four, one the statements referred to in said resolution was printed, and that a certain portion of the said statement was of the tenor following, that is to say:

"When the bill," (meaning thereby the said tariff bill) "was before the subcommittee of the Finance Committee of the Senate" (meaning thereby before a subcommittee of the said Finance Committee), "some of the officers and managers of the sugar trust" (meaning thereby of the said American Sugar Refining Company) "established themselves in Washington" (meaning thereby in the national capital) "being in New York" (meaning thereby in the city of New York, in the State of New York) "a part of the time and in Washington" (meaning thereby said Washington) "at frequent intervals;" and that a certain other portion of said last-mentioned statement was of the tenor following, that is to say:

"In the course of that conversation" (meaning thereby a certain conversation alleged elsewhere in said last-mentioned statement to have taken place between Henry O. Havemeyer, one of the said officers and managers of the said American Sugar Refining Company and certain members of the said Senate, and before the said Finance Committee so reported the said tariff bill to the said Senate as aforesaid) "it was said that if such a schedule as would be satisfactory" (meaning thereby an amendment to the said tariff bill, satisfactory to the said officers and managers of said corporation) "was adopted" (mean-

ing thereby adopted by the said Senate), "or even reported" (meaning thereby reported by the said Finance Committee to the said Senate) "the price of sugar" (meaning thereby the price of the stock of said American Sugar Refining Company) "on the market would advance thirty points in thirty days" (meaning thereby that in that event there would be an advance of thirty dollars in thirty days in the market value of each share of the stock of said American Sugar Refining Company); and that a certain other portion of said last-mentioned statement*ment* was of the tenor following, that is to say:

"On the very day that Mr. Voorhees, the chairman of the Finance Committee" (meaning thereby the said Finance Committee) "denied in the Senate" (meaning thereby in the said Senate) "that any amendments" (meaning thereby amendments to the said tariff bill other than those so reported by said Finance Committee) "were proposed to the Senate's bill as originally reported by the Finance Committee" (meaning thereby the said tariff bill as originally reported with amendments by the said Finance Committee as aforesaid) "the list of some four hundred amendments" (meaning thereby the said Jones amendments to said tariff bill) "as prepared by Senator Jones was in the hands of *one of* a member of the brokerage firm of Moore & Schley" (meaning thereby that before said Jones amendments had been submitted to the said Senate that copies of the same were in the hands of a certain firm of bankers and brokers doing business in the said city of New York under the firm name of Moore & Schley); and that on the eighth day of June in the year of our Lord one thousand eight hundred and ninety-four, and at the Capitol, at the city of Washington, in the said District of Columbia, the said committee being duly assembled under and in pursuance of said resolution, and for the purpose of conducting the inquiry

and investigation by said resolution directed to be made, one Elverton R. Chapman did appear before the said committee for examination as a witness, the said Elverton R. Chapman having been by the authority of the said Senate duly summoned to appear as such witness before said committee to give testimony upon the matter under inquiry before the said committee, under the said resolution, and was then and there, to wit, at the time and place last aforesaid, duly sworn by the said George Gray, the chairman of said committee, and took his corporal oath as such witness that the evidence which he should give in and upon his said examination as such witness should be the truth, the whole truth and nothing but the truth, and that the said Elverton R. Chapman did then and there, and at and upon the said examination of him, the said Elverton R. Chapman, before said committee, as such witness, depose, testify and declare in substance that he, the said Elverton R. Chapman, was engaged in business as a banker and broker, and that he was a member of the said firm of Moore & Schley, who were a firm of bankers and brokers doing business in the city of New York, in the State of New York; and that thereafter and on the ninth day of June, in the year last aforesaid, and at the District aforesaid, the examination of the said Elverton R. Chapman as such witness before said committee was continued, and that thereupon and on said last-mentioned day and at the District aforesaid, the said Cushman K. Davis, on behalf of said committee, propounded to the said Elverton R. Chapman, as such witness as aforesaid, a question of the tenor following, that is to say:

"Mr. Chapman" (meaning thereby the said witness), "you are asked whether the firm of Moore & Schley" (meaning thereby the said firm of Moore & Schley) "has bought or sold what are known as sugar stocks" (meaning thereby stocks of the said American Sugar Refining

Company) "during the month of February, eighteen hundred and ninety-four" (meaning thereby in the said year one thousand eight hundred and ninety-four), "and after the first day of that month, for or in the interest, direct or indirect, of any United States Senator?" (meaning thereby any member of said Senate); and that the said Elverton R. Chapman did then and there, to wit, on the said ninth day of June, in the year last aforesaid, and at the district aforesaid, wilfully refuse to answer the said question, and did then and there, to wit, at the time and place last aforesaid, make a response to the said question of the tenor following, that is to say:

"I decline to answer that question;"

and that thereupon the said Cushman K. Davis, on behalf of the said committee, did then and there, to wit, at the time and place last aforesaid, propound another and further question to the said Elverton R. Chapman as such witness, of the tenor following, that is to say:

"Has the firm of Moore & Schley" (meaning thereby the said firm of Moore & Schley), "during the month of March, eighteen hundred and ninety-four" (meaning thereby the said year one thousand eight hundred and ninety-four), "bought or sold any stocks or securities known as sugar stocks" (meaning thereby stocks of the said American Sugar Refining Company), "for or in the interest, direct or indirect, of any United States Senator?" (meaning thereby any member of said Senate): and that the said Elverton R. Chapman did then and there, to wit, at the time and place last aforesaid, wilfully refuse to answer the question last aforesaid, and did then and there, to wit, at the time and place last aforesaid, make a response thereto of the tenor following, that is to say:

"I decline to answer;"

and that thereupon the said Cushman K. Davis, on behalf of the said committee, did then and there, to wit, at the time and place last aforesaid, propound another and

further question to the said Elverton R. Chapman, as such witness, of the tenor following, that is to say:

"Has the firm of Moore & Schley" (meaning thereby the said firm of Moore & Schley) "during the month of April, eighteen hundred and ninety-four" (meaning thereby the said year one thousand eight hundred and ninety-four), "bought or sold any stocks or securities known as sugar stocks" (meaning thereby stocks of the said American Sugar Refining Company), "for or in the interest, direct or indirect, of any United States Senator?" (meaning thereby any member of the said Senate); and that the said Elverton R. Chapman did then and there, to wit, at the time and place last aforesaid, wilfully refuse to answer the question last aforesaid, and did then and there, to wit, at the time and place last aforesaid, make a response thereto of the tenor following, that is to say:

"I decline to answer;"

and that thereupon the said Cushman K. Davis, on behalf of the said committee, did then and there, to wit, at the time and place last aforesaid, propound to the said Elverton R. Chapman, as such witness, another and further question, of the tenor following, that is to say:

"Has the firm of Moore & Schley" (meaning thereby the said firm of Moore & Schley) "during the month of May, eighteen hundred and ninety-four" (meaning thereby the said year one thousand eight hundred and ninety-four), "bought or sold any stocks or securities known as sugar stock" (meaning thereby stock of the said American Sugar Refining Company), "for or in the interest, direct or indirect, of any United States Senator?" (meaning thereby any member of the said Senate);

and that the said Elverton R. Chapman did then and there, to wit, at the time and place last aforesaid, wilfully refuse to answer the question last aforesaid, and did then and there, to wit, at the time and place last aforesaid,

make a response thereto of the *the* tenor following, that is to say:

"I decline to answer;"

and that thereupon the said Cushman K. Davis, on behalf of said committee, did then and there, to wit, at the time and place last aforesaid, propound to the said Elverton R. Chapman, as such witness, another and further question, of the tenor following, that is to say:

"Is the firm of Moore & Schley" (meaning thereby the said firm of Moore & Schley) "at present carrying" (meaning thereby holding for an opportunity to sell the same to advantage) "any sugar stock" (meaning thereby stock of the said American Sugar Refining Company), "for the benefit of or in the interest, direct or indirect, of any United States Senator?" (meaning thereby any member of the said Senate);

and that the said Elverton R. Chapman did then and there, to wit, at the time and place last aforesaid, wilfully refuse to answer the question last aforesaid, and did then and there, to wit, at the time and place last aforesaid, make a response thereto of the tenor following, that is to say:

"I decline to answer;"

and that the said question first aforesaid, and the said several and further questions last aforesaid, so propounded on behalf of the said committee to the said Elverton R. Chapman as such witness by the said Cushman K. Davis, as aforesaid, were then and there, to wit, on the said ninth day of June, in the year of our Lord one thousand eight hundred and ninety-four, and at the district aforesaid, pertinent to the inquiry then and there being made by the said committee under the resolution aforesaid, and were then and there especially pertinent to so much of said inquiry as had for its object the ascertainment, as matter of fact, whether any member of said Senate had been during the pendency of the said tariff

bill before the said Senate, that is to say, between the said second day of February and the said seventeenth day of May, in the year last aforesaid, speculating in the stocks of the said American Sugar Refining Company: against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

ARTHUR A. BIRNEY,
Attorney of the United States in and for the District of Columbia.

[Endorsed:] A true bill. Louis Heilbrun, *Foreman.*

A true copy.
Test:

J. R. YOUNG, *Clerk,*
[SEAL.] By F. W. SMITH, *Ass't Clerk.*

Exhibit B.

Demurrer to the Indictment.

Filed in open court October 11, 1894.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.

THE UNITED STATES
vs.
ELVERTON R. CHAPMAN. } No. 19985.

Elverton R. Chapman, the defendant named in the indictment filed in the above-entitled case, appearing by his attorneys, Shellabarger & Wilson, only for the purposes of this demurrer, says that said indictment is bad in substance.

SHELLABARGER & WILSON.

NOTE.—The following propositions, amongst others, are intended to be argued in support of the foregoing demurrer:

1. That the Senate of the United States, as to all matters where by the Constitution of the United States it is endowed with and empowered to exercise judicial functions as distinguished from political and diplomatic powers which under the Constitution it may exercise, is a court or tribunal of limited and specifically defined jurisdiction, and in determining in any given case the question of the power or jurisdiction of the Senate to exercise any judicial functions or to do any act under its alleged judicial powers no presumptions are made in favor of its jurisdiction to do such act or exercise such power, but, on the contrary, every requisite for the conferment of such judicial jurisdiction must appear on the face of the proceedings in which the alleged judicial act is performed; otherwise such act is in law one without jurisdiction and void.

2. The judicial powers conferred by the Constitution upon the Senate of the United States, as distinguished from its political and diplomatic powers, are—

(*a.*) That the Senate may punish its members for disorderly conduct or for failure to attend its sessions.

(*b.*) May decide cases of contested elections thereto.

(*c.*) May determine the qualifications of its members.

(*d.*) May try impeachments, and,

(*e*) By a two-thirds vote, expel a member.

3. If, indeed, it is within the power and jurisdiction of a committee of the Senate engaged in making an investigation under an order of the Senate looking and directed to securing information for the use of the Senate in aid of its legislative powers, as distinguished from its aforesaid judicial powers, to demand of and from a witness sub-

pœnaed to give testimony before the committee so authorized and engaged the surrender, exhibition, or disclosure of any of the private papers, documents, or business of the witness, even then and in such case the authority conferred by the Senate upon such committee to make such investigation must affirmatively and expressly show that said investigation is ordered and looks to the aid of the Senate in adopting legislation pending or to be pending before the Senate, whereas in the present case the authority from the Senate under which the committee was acting when the questions named in the indictment were put to the witness wholly fails to show that the aim or object of the investigation had any such purpose as that aforesaid.

4. The resolution under which the committee named in the indictment acted in subpœnaing the defendant and in asking the questions which the accused declined to answer fails to show, either expressly and affirmatively or even argumentatively, that the committee was empowered either to try any Senator for disorderly behavior, or for his expulsion, or for contempt, or for the infliction of any other punishment, or to try any other of said questions committed to the judicial cognizance of the Senate, or that said investigation was ordered for or looked to the aid of the Senate in framing or adopting legislation, but, on the contrary, shows that the committee was not authorized to make or conduct any such judicial inquiry touching any matter embraced in any question set out in said indictment, and wholly fails to show that said investigation looked to the aid of the Senate in framing or adopting any legislation whatsoever.

5. The Senate, by reason of the foregoing principles limiting its judicial jurisdiction, and moreover, by reason of the provisions in the fourth and fifth amendments to the Constitution of the United States, making the people to be secure in their persons, houses, papers, and effects

against unreasonable searches and seizures and protecting them against being required to be witnesses against themselves, as well as the other established principles of the laws and Government of the United States protective of the rights of citizens, has no power or jurisdiction to demand of any citizen subpœnaed to give testimony before one of its committees the surrender, exhibition, or disclosure of any of the private papers, documents, or business of the citizen otherwise than in the course of judicial proceedings or in a direct suit prosecuted for that purpose, and therefore, since the committee was not authorized by the Senate to enter upon, make, or decide any of the distinct and specific judicial questions aforesaid, or to make any investigation for the purpose of aiding the Senate in legislation, it was without jurisdiction or power to ask and had no authority to require answers to any of the questions set forth in the indictment as those which the accused declined to answer, touching his private and confidential business, and his refusal to answer said question was not an offense against the provisions of section 102 of the Revised Statutes or against any other law of the United States.

6. The Senate, in exercising any of its judicial functions aforesaid, in order to be entitled to demand from a citizen the disclosure of his private papers and business, must give to its judicial proceedings such forms as are required in the exercise of all judicial powers and proceedings before the right and jurisdiction to exercise such judicial powers, such as the compulsion of the production of private papers and affairs, can attach—that is to say, whilst in the absence of legislation expressly requiring it no technical pleadings as such may be necessary in order that the powers incident to judicial proceedings may attach to a proceeding in one of the houses of a legislature or of Congress, yet the radical and essen-

tial elements necessary in order that any judicial powers may attach to the proceeding of such legislative body must be in the case.

For example, if the proceeding is directed to the trial of and decision on some alleged wrong-doing by a party over whom the investigating body has jurisdiction, then, before the exercise of judicial powers such as compelling the disclosure by a witness of private papers or affairs can attach to the proceeding, there must be a prosecution, there must be a designated party accused, and there must be a statement of the grounds of prosecution or action, definite and specific, enabling the accused to know whereof he is accused and to prepare his defense and make it. A mere "drag-net," thrown out to catch somebody, anybody, everybody, or nobody, is no more a judicial "form" of proceeding or the prosecution of a "case," such as is presented by the Senate proceeding in the present case, than would a similar proceeding be a judicial proceeding in one of the courts entitling such court to demand the exposure by witnesses of their private business.

7. That part of the resolution under which the committee acted which says that "said committee be authorized to investigate and report upon any charge or charges which may be filed before it alleging that the action of any Senator has been corruptly or improperly influenced in the consideration of said bill, or that any attempt has been made to influence legislation," not only does not furnish any answer to the points above stated as to the necessity of a definite, distinct, and specific accusation and prosecution of some person or persons, but, on the contrary, shows that the Senate deemed a specific charge or accusation to be an essential prerequisite to a senatorial prosecution or trial such as would entitle the committee to demand from witnesses the exposure of their private papers and affairs. It shows this

last because, before the committee was authorized to investigate any "charge or charges," the resolution required that the "charge" should be "filed" before the committee and should allege that the Senator had been "corruptly influenced."

Since no such "charge" has been "filed" or made by anybody whomsoever and no criminal conduct has been imputed by anybody as to anybody over whom the Senate had jurisdiction, therefore the condition of fact and of jurisdiction which said clause of the resolution shows the Senate designed should exist before anybody should be put upon trial on any "charge" had, in fact, never arisen at the time these questions were asked, and therefore for this additional reason it is made to appear that the Senate committee was without jurisdiction to ask the questions which the accused declined to answer.

8. That, so far as the authority given to said committee by said resolution of the Senate is directed to the investigation of dealings in "sugar stocks" or "certificates," it looks and is confined to the investigation by the Senate into the private affairs of the citizen, and which dealings are not in themselves unlawful, and, whether unlawful or not, the courts alone have jurisdiction to try and dispose of any alleged wrong-doing, and in such matters Congress has no jurisdiction; hence the refusal by the accused to answer questions, as set out in the indictment, and which the committee had no jurisdiction to ask, was not an offense against said section 102 of the Revised Statutes or any other law of the United States.

9. Said indictment is fatally defective in that it fails to set forth and aver that any of the steps required to be taken by section 104 of the Revised Statutes were taken prior to the action of the grand jury in finding said indictment.

SHELLABARGER & WILSON,
Attorneys for Defendant.

Service of a copy of the above acknowledged this 11th October, 1894.

A. A. BIRNEY.

A true copy.
Test:
[SEAL.] J. R. YOUNG, *Clerk.*
By F. W. SMITH,
Asst. Clerk.

Filed November 19, 1894.

In the Supreme Court of the District of Columbia.

UNITED STATES
vs.
ELVERTON R. CHAPMAN. } Criminal. No. 19985.

Additional Grounds of Demurrer.

1. That Congress has no power to make the refusal of a witness summoned before a committee to testify a crime.

2. That Congress has no authority to delegate the power to punish for contempt of either branch thereof or of a committee to the courts, as is attempted in section 102, R. S. U. S.

It is hereby stipulated by and between counsel for the respective parties that the above additional grounds of demurrer to the indictment herein may be filed and treated as a part of the demurrer heretofore filed herein on the 11th day of October, 1894.

(Signed) A. A. BIRNEY,
U. S. Att'y, D. C.
J. M. WILSON,
For Defendant.

A true copy.
Test:
J. R. YOUNG, *Clerk.*
By A. W. SMITH,
Asst. Clerk.

Exhibit C.

Order Overruling Demurrer and Requiring Defendant to Plead.

UNITED STATES
vs.
ELVERTON R. CHAPMAN. } No. 19985. Indicted for Violation Section 102, R. S. U. S.

Comes as well the attorney of the United States as the defendant, by his attorneys, Messrs. Shellabarger & Wilson; whereupon, the defendant's demurrer to the indictment coming on to be heard, after argument it is considered that said demurrer be, and it hereby is, overruled, and the defendant is ordered to appear before this court to plead to the indictment herein pending against him; whereupon the defendant, by his attorneys, notes an appeal to the Court of Appeals, which is granted.

A true copy.
Test:

J. R. YOUNG, *Clerk.*
By F. W. SMITH,
Asst. Clerk.

Exhibit D.

Order Allowing Appeal.

In the Court of Appeals of the District of Columbia, October Term, 1894.

ELVERTON R. CHAPMAN
vs.
THE UNITED STATES. } No. 19985.

In consideration of the special and peculiar nature of this case, we have, in the exercise of the discretionary power vested in this court under the statute, concluded to allow the appeal as prayed, and it is so ordered.

By the court:

R. H. ALVEY,
Ch. Justice.

Nov. 22, 1894.

A true copy.
Test:
[SEAL.] ROBERT WILLETT, *Clerk.*

A true copy.
Test:
J. R. YOUNG, *Clerk.*
By F. W. SMITH.
Asst. Clerk.

Exhibit E.

Supreme Court of the District of Columbia, holding a Criminal Term.

FRIDAY, *January* 18, 1895.

The court resumes its session pursuant to adjournment, Mr. Justice Cole presiding.

* * * * * * *

UNITED STATES *vs.* ELVERTON R. CHAPMAN. } No. 19,876. Indicted for violation of Section 102, R. S. U. S.

Now comes here Lewis J. Davis, surety of said defendant on the recognizance in this case, and surrenders the defendant to the custody of the court, and prays that he, the said surety, may be released and exonerated upon further obligation upon said recognizance, which is so ordered; and the defendant, in default of other bail, is committed to the custody of the United States marshal for the District of Columbia, to await further action in this cause.

I, John R. Young, clerk of the Supreme Court of the District of Columbia, do hereby certify that the above is a true copy of the entry in Minutes No. 28, Criminal Court No. 2.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, District of Columbia, this 18th day of January, A. D. 1895.

JOHN R. YOUNG,
Clerk Supreme Court District of Columbia.

IN THE

Supreme Court of the United States.

In the Matter of the Imprisonment of Elverton R. Chapman, in a Proceeding in the Supreme Court of the District of Columbia, Holding a Criminal Term, upon an Indictment in said Court, under Section 102 of the Revised Statutes of the United States.

Petition for Allowance of Writ of Habeas Corpus.

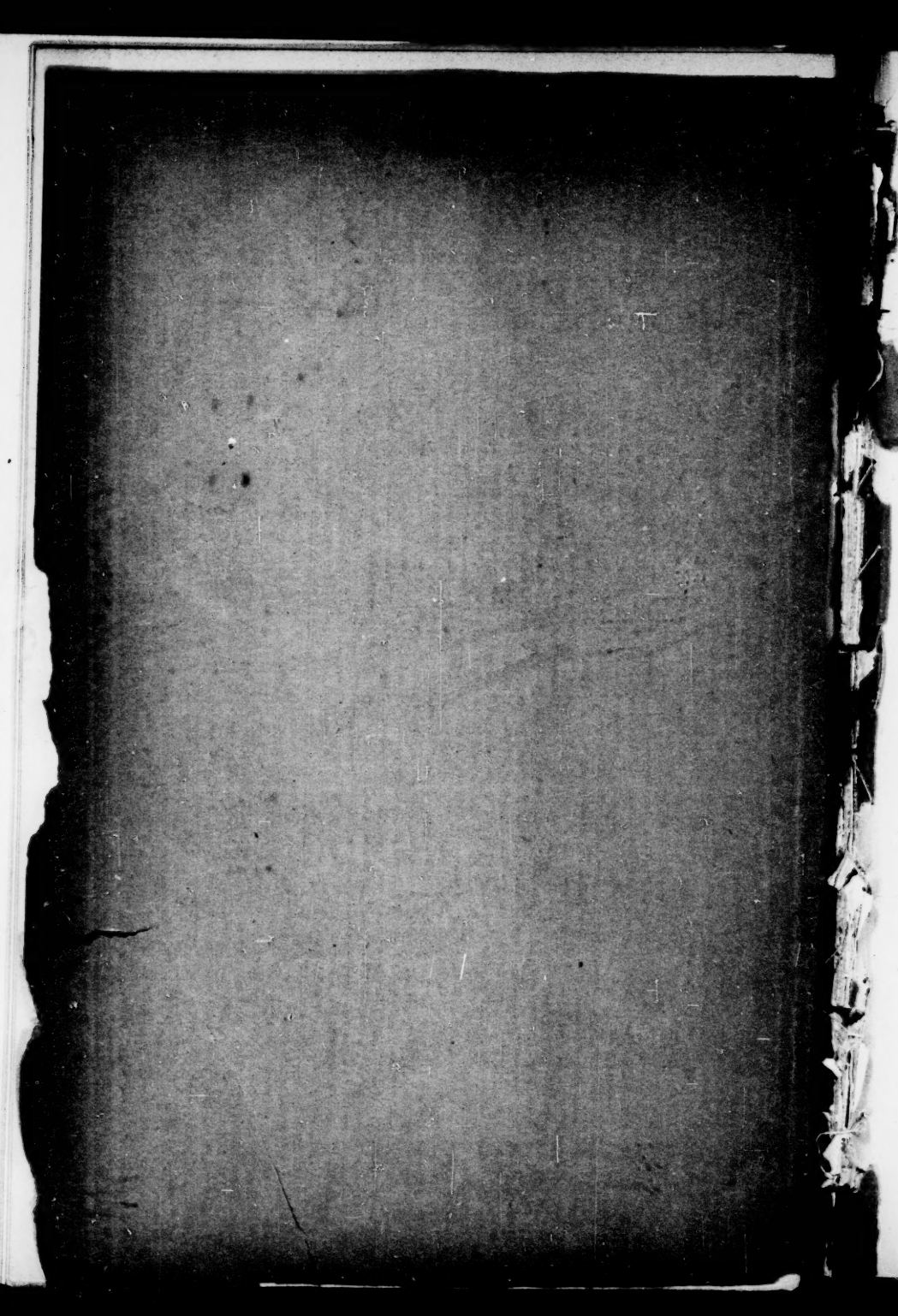
BRIEF ON BEHALF OF ELVERTON R. CHAPMAN IN SUPPORT OF SAID APPLICATION.

By his Attorneys,

SAMUEL SHELLABARGER, and

JEREMIAH M. WILSON.

Press of McGILL & WALLACE 1107 E Street N. W.



IN THE

Supreme Court of the United States.

In the Matter of the Imprisonment of Elverton R. Chapman in a Proceeding in the Supreme Court of the District of Columbia, holding a Criminal Term, upon an Indictment in said Court under Section 102 of the Revised Statutes of the United States.

PETITION FOR ALLOWANCE OF WRIT OF HABEAS CORPUS.

Brief on Behalf of Elverton R. Chapman in Support of Said Application.

[*Note.*—We have divested the brief filed by us in the Court of Appeals of the District of Columbia, in the above-named case of Elverton R. Chapman, of all matter not going to the question of the power and jurisdiction of the Senate of the United States, the Senate Committee of Investigation, named in the above-named indictment,

and of the said Criminal Court, in and over said matters entering into said prosecution of the said Chapman; and so divested, we venture, with the leave of the court, to file said brief, in this court, in support of said application for said writ of *habeas corpus*. We file the said brief addressed exclusively to said matters of power and jurisdiction because said question of jurisdiction is the only question entering into the merits of our said application.]

It may not be amiss to state, at the opening of this argument, some points bearing upon the matter of the practice and the powers of this court relating to the granting of our present application.

1. We state the first of these preliminary propositions in the following words, taken from the language of this court in the opinion, by Justice Bradley, in the *Nielsen Case* (131 U. S., 182):

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the cases of *Ex parte Lange*, 18 Wall., 163, and *Ex parte Siebold*, 100 U. S., 371, and in several other cases referred to therein."

2. This writ will not be refused by this court because the same remedy sought by this application might be obtained through the writ of *habeas corpus* from some inferior court in this District, as, for example, from said Criminal Court of the District, or from said Court of Appeals.

This is so because it is disclosed by the exhibits attached to the petition for the writ filed herein, that both of these courts have passed adversely to Mr. Chapman upon the only question entering into the matter of the propriety of granting a writ of *habeas corpus*, to wit, the right, power, and jurisdiction to imprison the accused under and by virtue of said prosecution, and have held that such jurisdiction exists, and said Criminal Court made the order for said imprisonment.

This court, in *Terry's case* (128 U. S., 302), uses the following language, showing that when the conditions under which an application for a writ of *habeas corpus* is made to this court are such as we have just stated, to wit, adverse actions by the courts below, there this court will (all other conditions being favorable to the allowance of the writ) not drive the party to an application to the inferior courts, but will allow the writ. We quote:

"In *Sawyer's case*, 124 U. S., 200, this court entertained an original application for a writ of *habeas corpus* without requiring the petitioner to apply, in the first instance, to the proper Circuit Court; but, in that case, as in this, the application proceeded upon the ground that the Circuit Court itself had made the order by which he was alleged to have been deprived of his liberty in violation of the Constitution of the United States."

3. It is no objection, we submit, to the allowance and the issuing by this court of said writ that in said Criminal Court there has been no trial or final judgment.

This is true for, amongst others, the following reasons:

(*a*) It is insisted by this application that such trial and and final judgment would be absolutely void—a mere nullity—and would, therefore, be subjecting the accused to grievous annoyance, vexation, hardship, and disgrace in order to reach such final judgment, which, when reached, would be utterly void. This, we submit, this court will

not do, but, on the contrary, will grant the writ on this application, and will inquire into said question of jurisdiction now unless the court can see clearly that there is no rational foundation for said contention asserting said absence of jurisdiction.

In principle this was held in *Ex parte Royall* (117 U. S., 241), where the court held what the head-note thus states, after first stating that the circuit courts of the United States have jurisdiction on *habeas corpus* to discharge from custody per-ons restrained of their liberty in violation of the Constitution of the United States, but who, at the time, are held under State process for trial on an indictment charging them with an offense against the laws of the State:

"When a person is in custody, under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted; but this discretion should be subordinated to any special circumstances requiring immediate action. After conviction of the accused in the State court, the Circuit Court has still a discretion whether he shall be put to his writ of error to the highest court of the State or whether it will proceed by writ of *habeas corpus* summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States."

(*b*) But the discretion named in the head-note just quoted will in a case like the present be exercised in favor of now granting the writ, for the reason that if the writ is refused the citizen, the accused, is absolutely and totally cut off from all right, power, and opportunity to have the question of the constitutionality of his imprisonment determined in this the highest court existing under the

Constitution; and that, too, in a matter involving one of the most sacred safeguards of liberty as guaranteed by the Fourth and Fifth Amendments to the Constitution, and by other provisions of law protective of private rights and personal liberty.

This absence of all opportunity to reach this court with said constitutional question is thus made evident—

First. After such trial and judgment, no error committed in such trial not going to the matter of jurisdiction can be carried to this court, either by writ of error or otherwise, because this is a criminal case.

See *In Re Schneider*, 148 U. S., 157; *Cross* v. *Burke*, 146 U. S., 82; *In Re Heath*, 144 U. S., 92; *Cross, Petitioner*, 146 U. S., 271; *Cross* v. *United States*, 145 U. S., 571; *Railroad Co.* v. *Grant*, 98 U. S., 398; *Dennison* v. *Alexander*, 103 U. S., 522; *Tuck* v. *Wannamaker*, 147 U. S., 149, these being cases cited by this court at page 162, 148 U. S., in support of the proposition stated in that case in the head-note, in the following words:

"A writ of error from this court does not lie to a judgment of the Supreme Court of the District of Columbia dismissing the petition of a convict for a writ of *habeas corpus*."

Also see *In Re Schneider* (148 U. S., 162), in which it was held that the writ of *habeas corpus* would not issue from this court because the questions presented were questions of error, and not jurisdictional.

Second. It follows, that since the accused can have no review in this court in a criminal case of mere questions of error as distinguished from questions of jurisdiction, therefore if this court denies the writ of *habeas corpus* for the purpose of reviewing the constitutional question of jurisdiction, then there is absolutely no way of reaching this court for the trial of such constitutional question.

The preliminary propositions now stated enable us to enter upon the discussion of the above-named question of power and jurisdiction of the Senate, of the Senate Committee and of the court, which we carefully consider in the following argument, and earnestly beg to the entire argument such consideration, by the court, as the supreme importance of the questions here involved shall seem to the court to require.

We submit, in advance, and at the threshold of the argument, that these questions of jurisdiction, considered in the following argument, are all ruled and settled by the decision of this court in the case of *Kilbourn* v. *Thompson* (103 U. S., 168), especially as that case is explained and interpreted by Justice Miller, the author of the great opinion of the court in that case, as found at page 415 of the book published by Bancroft Davis containing the lectures by Justice Miller before the Columbian Law School of this city, a short extract from which page, 415, is quoted at printed page 18 of our argument herewith submitted.

We submit, in support of this application, the said argument as follows:

BRIEF.

I.

These Indictments Must be Quashed Because the Act Upon Which they are Based is Unconstitutional.

As applied to the present case, sec. 102, R. S., provides that if any person, summoned as a witness, having appeared, "refuses to answer any question pertinent to the question under inquiry," he "shall be deemed guilty of a misdemeanor," &c.

Sec. 103 provides that he shall not be privileged to refuse to testify on the ground that his testimony, or the production of the paper may tend to disgrace him or render him infamous.

These two sections are parts of one scheme, and they are inseparable.

The provisions of this act are, in substance and effect, precisely as though it had been enacted as follows: If any person, summoned before a committee of the Senate shall refuse to testify, even though his testimony may tend to criminate him, he shall be deemed guilty of a misdemeanor and shall be punished, &c.

It can not be doubted that such an act would be void, and we submit that the fact that the division into two sections does not relieve any part of it from this objection.

The intent of Congress is clearly expressed, and no part of the act can be judicially eliminated so as to relieve some other part of the virus that permeates the whole.

Baldwin *v.* Franks, 120 U. S., 679;
Prosser *v.* Illinois, 116 U. S., 252;
Virginia Coupon Cases, 114 U. S., 269;
United States *v.* Reese, 92 U. S., 214.

2. If section 103 be eliminated, section 102, standing alone, is void, because it is a broad provision that if any person shall "refuse" to testify, without any limitation whatever, he shall be guilty of a misdemeanor, &c.

The intention of Congress must be as broad as its language. The courts can not limit the scope of the language, nor can the courts apply the language to cases where Congress would have the power to make the act an offense and exclude others when Congress did not have the power.

This provision, that if any person shall "refuse," is

broad enough to embrace a refusal because the answer would criminate, and the courts can not say that such void part must by the courts be excluded, and that it may be operative as to others, nor can the courts say that Congress did not intend to embrace such acts, that it was not in the power of Congress to embrace.

In the trade-mark cases (*100 U. S., 82*) the court, at page 98, says:

> "It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

See also cases cited, *supra*.

But the intention of Congress to embrace cases not within its power is made manifest by section 103, and it is not in the power of the courts to revise that intent. Therefore the act is wholly inoperative and void.

(Later on in this brief we shall insist that this act is void because it is an attempt to surrender the power of the two Houses of Congress to punish for contempt, and to delegate that power to a court.)

II.

The Committee of the Senate had no Jurisdiction to Inquire into the Private Affairs of the Citizen, or to Ask and Require Answers to the Questions upon the Refusals to Answer which these Indictments are Based.

We attempt at the opening of the discussion of this proposition to state carefully and accurately the leading grounds upon which we rest it.

If the act is constitutional, still it is no part of the design of section 102, under which these indictments purport to be framed, to make it a crime for a witness to refuse to answer any question put by a committee of either House of Congress, touching the lawful private business and affairs of the witness, unless the committee has received from the House, under whose resolution it is proceeding, due authority to ask, and enforce answers to, such questions.

2. It is not within the power or jurisdiction of either House of Congress to grant to one of its committees, appointed to investigate and report thereto, authority to compel a citizen to disclose and make public his lawful business transactions which are *wholly private* and personal, *unless and except* such authority affirmatively sets forth and shows the *jurisdictional facts* which are requisite in order to authorize the committee to compel such disclosures, and to punish, as contempt, the persistent refusal of the witness so to disclose; and which jurisdictional facts include an affirmative statement that such House requires such disclosure in order to enable it (*a*) to exercise some one or more of those judicial functions thereof, which are enumerated in paragraph 1 of the syllabus to the Supreme Court report of the case of *Kilbourne* v. *Thompson* (*infra*); or (*b*), possibly, that such disclosure is, by such House desired, and is appropriate, to enable it to frame or decide upon the adoption of contemplated legislation.

3. There is, in the resolution of the Senate under which the committee derived whatever authority it had to investigate and ask questions in the present case, a total absence of any and all indication that said investigation was resorted to with any design or expectation on the part of the Senate to use the results of the investigation either in aid of the exercise of its said judicial powers,

or in aid of any one or more of them, or in aid of any contemplated legislation; nor does it at all appear by said resolution that such invasion of the private affairs of the witnesses was required, or deemed necessary or appropriate, or was desired by the Senate, in order to aid in the execution of any of its constitutional powers or functions. Said resolution gave no authority to the committee whatever to pry into the private affairs of any citizen, or to punish him, or to cause him to be punished, for contempt in refusing to make answer to questions such as are set out in the said indictments, respectively.

4. Hence said committee had no jurisdiction or power to ask, or to require answers to, such questions, or to either of them, and the refusal of the defendants to answer the same was not in violation of the provisions of section 102 of the Revised Statutes of the United States.

Limitations, in the Courts, on Power to Enforce Disclosure of Private Affairs.

We shall now state a set of propositions, generally without any extended elaboration, each one of which we hope to thoroughly fortify by reason and authority, and which lead to the conclusion that the committee was without jurisdiction to ask the questions which the accused declined to answer.

We commence with the following proposition, which we take from the second paragraph of the syllabus of the case *In re Pacific Railway Commission* (32 Fed. Rep., 241):

"Congress can not compel the production of *private books and papers* of citizens for its inspection, except in the course of judicial proceedings, or in suits instituted for that purpose; *and then only upon averments that its rights in some way are dependent upon evidence therein contained.*"

On page 250, in the opinion by Justice Field, this is repeated in these words:

"In the pursuit of knowledge it" (the commission) "can not compel the production of private books and papers of citizens for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, *and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence of those books and papers.*

"Of all the rights of a citizen few are of greater importance or more essential to his peace and happiness than the right of personal security, that involves not merely protection of his person from assault, but exemption of his *private affairs*, books and papers from the inspection and scrutiny of others. Without this right all others would lose half their value."

And see as to judicial character of such a proceeding Commerce Commission *v.* Brinson, 154 U. S., 485; Whitcomb's Case, 120 Mass., 118.

This statement, regarding when the courts will compel an unwilling defendant to exhibit to his adversary, or to others, his private papers, is based upon the principles of equity, established in this country and in England, from time immemorial, and this element of our law has been embodied in the statutes of 14th and 15th Victoria (*4 Jacobs & Fisher's Dig., 4845*), and other later English statutes; and also in the statutes of the United States, such as sections 724 and 689 of the Revised Statutes, and others. When Justice Field here says that "in "each of these classes of cases the production of books "and papers can only be ordered upon averments that "the applicant's rights are in some way dependent for "enforcement upon the evidence of these books and pa-"pers," his statement falls *far* short of stating the strictness with which the law surrounds and protects such private books and papers.

Under section 869 of the Revised Statutes, if the production of papers and documents is demanded, the application must be accompanied by an affidavit of the party applying, showing that the document is in the possession of the witness, and that the same, if produced, would be *competent and material* evidence.

In stating these requirements under the English and American equity jurisprudence, Story's Equity Pleading (10th edition), in section 318, speaking of what a bill of discovery must show in order to get at such documents, says that it must show that the plaintiff *has a title and interest, what* that title and interest *is* in the subject-matter respecting which discovery is sought; that the applicant is *not a stranger* to that title; that the title is not a contingent or future, but a present and vested one. It must also show, not only the plaintiff's interest in the subject-matter, and that he is entitled to call for the documents, but it must state a case which will constitute a ground for a suit or defense at law; the object of the court in compelling discovery being to enable some *other* court to decide on matters in dispute between the parties, the discovery of which is material. If the bill does not show such a case as renders the discovery material to support or defend the suit *it is plainly not a case for the interposition of the court.* Unle s all these, and other like features, are shown, *the bill is demurrable, and, on demurrer, will be dismissed.* (See the cases cited in notes 2 and 3 to section 318, and notes 5 and 6 and note a to section 319 of Story's Equity Pleading.)

The above-named statutes of 14 and 15 Victoria are, in substance, the same as our section 724 of the Revised Statutes, and which last-named section permits the party calling for the papers to enforce their production *only* when, "by the ordinary rules of proceeding in chancery," such production is enforceable. We have just stated from sections 318 and 319 of Story's Equity Plead-

ings, and the cases in the notes, under what circumstances such enforced production is compelled "by the ordinary rules of proceeding in chancery."

In the case of *McIntyre* v. *Mancius* (3 Johnson's Chy., 45–7), decided in 1817, the court stated the ground upon which it refused to allow any order for the production of books, &c. The Chancellor based such refusal upon the ground that no sufficient equity was set forth in the bill, in that the nature of the defense at law was not stated. "For anything," said the court, "that appears on the "bill, the discovery called for may be utterly useless or "frivolous, or it may be to enable the defendants at law "to convict the plaintiffs of a crime, or to subject them "to a forfeiture." "It is not," said the court, "improba- "ble that the defense at law is usury, and then the as- "sistance of this court would be obtained without a pre- "vious offer to do the defendants justice by paying the "sum equitably due." (And see *Wilson* v. *Wabber* (2 Gray, 558, and authorities there cited.

These principles run through the entire body of the cases in the American and English courts. They exclude parties from any right to the production of papers in the courts unless they show, definitively, that they have a case, what that case is like, wherein and how the papers demanded will tend to throw light on the case; that that light is material to the case of the party applying, and that the discovery is not sought for the purpose of bringing the party required to produce these papers into contempt or disgrace, or to criminate him, or the like.

Such, incontrovertibly, is the care and jealousy with which, *in all courts in England and the United States*, the citizen is protected against being unreasonably or unnecessarily required to disclose his "private affairs," whether by the production of documents or by giving testimony exposing such private affairs. (See 103 U. S., near bottom of page 190; also, 32 Federal Reporter, near bottom of page 251.)

We shall come presently *and more directly* to the vital question in this case, whether the law has thus solicitously and scrupulously protected against unnecessary invasion the private papers and affairs of every citizen, even where the proceeding is *one being conducted under the care and scrutiny of the courts of justice*, and notwithstanding this, and at the same time, has left open to unlimited and ruthless invasion *all* the private affairs of *every* citizen when called upon to testify before some legislative body or committee.

Restraints Upon the Courts, Created by the Fourth and Fifth Amendments to the Constitution, Protective of Private Rights and Liberties, are Equally Applicable to Proceedings in Legislative Bodies.

The proposition stated in the foregoing head line is, in principle and reason, self-evident. To impose these restraints, created by said amendments to the Constitution, upon the courts, which are the most enlightened, the most conservative, and the most highly-educated tribunals known to our law, and which from long before the origin of our Government, and ever since such origin, have been and are universally regarded as the safest repositories of the liberties and rights of the citizen, and then to leave them to be disregarded by the legislative bodies, and the committees thereof, and to place all private property and private and domestic rights and affairs at the mercy of any and every member of such committee, however ignorant and regardless of such rights he may be, and however wild and furious in his pursuit of the knowledge of the private and domestic affairs of his neighbors or his enemies he may be, would be simply madness.

The absurdity of such a view is so extreme as to exclude it from the possibility of being intended by the Constitution or our system of laws. But there is abundant authority touching these restraints on legislative bodies. *Emery's Case* (107 Mass., 172) is, upon this particular subject, the leading case in the United States, and so far as we can find, has been universally and without a single exception approved in the courts of the United States, and of these States, whenever the matters embraced by it became involved.

In this *Emery Case* (at pp. 182-3) the court comes to our direct question, namely, whether legislative bodies and committees are, like the courts, subject to all the requirements protective of private rights, to which the law subjects the courts, and it answers the question in these most emphatic words:

"*No one will contend, of course, that the legislature is not limited in its powers by the provisions of the Constitution, equally with all other departments of the Government* and the whole body of the Commonwealth, whether undertaken to be exercised *in the ordinary form of laws enacted, or by those orders and requirements which are incidental to its functions and are adopted as a means of their performance.* There is nothing in the terms of the article in question to *except legislative* bodies from its operation. *The nature and purpose of the provisions are equally applicable to investigations conducted by the legislature itself, or by one of its branches, or by a committee of its own members, as when conducted before the courts, or by commissioners, or other tribunals established by law. Such tribunals can in no case disregard this rule of protection. The legislature can not, by the most formal and solemn enactments of law, authorize them to do it. If, then, the legislature can not, by the formal enactment of all its branches, subject a citizen to such compulsory disclosure, it is difficult to see on what ground of argument or inference, from necessity, propriety, or the nature of constitutional republican government, an authority can be deduced for either branch of the legislature to do so by its mere order.*"

It would be impossible for us to impress upon the attention of the court too earnestly the consequences, to the case at bar, of the fact that the Supreme Court of the United States has carefully reviewed this case of Emery, and has affirmed and approved it fully and with much emphasis, so far as relates to the doctrines which we here quote from it: Lee 142 US 564 71-6 8-85=6.

In Note 3, page 164, of Cooley's Constitutional Limitations (4 ed.), the author says: "But the privilege of the witness to be exempt from a compulsory disclosure of his own criminal conduct is the same when examined in a legislative body or committee as when sworn in court. *Emery's Case*, 107 Mass., 172." Then, again, the same author, in Note 1, page 384, says: "A legislative body has no more right than a court to make its examination of parties or witnesses inquisitorial. *Emery's Case*, 107 Mass., 172."

The doctrines of this case of Emery, which we have quoted, are reasserted in the case of *Cullen* v. *Commonwealth* (24 Grat., 624), and also in the case of *United States* v. *James* (60 Fed. Rep., 261).

The Rules Protective of Rights Secured by the Fourth Amendment to the Constitution, which are Applied in the Courts, are Capable of Application to Legislative Investigations.

It may be asked, in this connection, how it can be possible to apply to a legislative investigation the rules which we quote from sections 318 and 319 of Story's Equity Pleadings, since those rules are applicable to actual "cases" in the courts; whereas committees of investigation ordinarily have no "case" before them as such, and, therefore, can not apply rules to their investigations which, in their nature, can only be applied to

cases in court. And, further, that such a limitation on committee investigations as courts apply to bills of discovery, and the like, would render impracticable any valuable investigation.

This question is appropriate enough, but the replies to it are extremely plain and obvious.

One reply is that the Fourth Amendment to the Constitution and the equivalent "maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the Government and protection in person, property and papers against even the processes of the law, except in a few specified cases," and which maxim is that "every man's home is his castle, and which prohibits "unreasonable searches and seizures" (see *Cooley's Const. Lim., s. p. 299, t. p. 369, 4th edition*), are exceedingly plain, unambiguous and peremptory commands of the fundamental law, and can not be misunderstood or disregarded either by courts or by legislatures or the committees thereof.

Hence an investigation that proposes to pry into the private affairs of the citizen, in cases falling within said maxim and amendments to the Constitution is to be, and must be, defeated so far as it attempts to invade said private rights. It may not always be "convenient" for adventurers, and others of aggressive tendencies, to observe these fundamental provisions of the Constitution, but arguments based on such inconvenience, when urged in favor of violating plain law, are always contemptuously swept from the presence of the courts and all other just tribunals when so urged.

Another reply is that it is a mistake to say that the enforcement by legislative committees of said Fourth Amendment would materially tend to defeat legitimate legislative action or investigation. In nine hundred and ninety-nine cases out of a thousand witnesses are ready to answer all pertinent and respectful questions; and,

hence, the observance of the protections furnished by said Fourth Amendment would not interfere in more than one case in a thousand with full and free investigation.

Still another reply is that in investigations looking to the enforcement of those classes of powers pertaining to the Houses of Congress respectively, and commonly denominated their judicial powers, which are set out in the first paragraph of the head notes to the *Kilbourn-Thompson* case (103 U. S., 168), the committee *does have* before it a "case" to which all the rules applied in the courts protective of private rights and affairs are most readily applicable.

But if it is to be held that the right to compel disclosures of the private affairs of citizens applies to an investigation resorted to avowedly in aid of the *legislative functions* of Congress, even then there is, practically, no difficulty in applying said rules protective of the citizen's privacy, because, in such cases, the resolution creating the authority of the committee can readily state what the aim of the investigation is, that it is one which justifies exposure of such private affairs, and what action, or what *kind* of action, is expected to be based upon the results thereof.

And in case the Record does so disclose in advance the aim or object for which the investigation is instituted, it can then be seen whether the question asked has any pertinency in aid of the judicial or the legislative action "avowed" by the authority given to the committee. When the Record so discloses the Congressional action contemplated, and the information needed in regard thereto, then the Government has placed before the witness a "case" in which the Government is concerned, and the pertinency of the evidence is made plain in advance.

By what we here say regarding that which is not decided in the Kilbourn case, namely, the right to en-

force disclosures of private affairs when needed in support of avowed *legislation*, we by no means concede that private affairs can be dragged out from unwilling witnesses on a vague and shadowy contention or claim that the disclosures will aid some contemplated legislation. This we deny *toto celo*. But, *assuming* that in this we are wrong, still there is no difficulty in applying the rules, protective of citizens against unreasonable searches and seizures, to legislative bodies.

We are authorized to make this denial of power in the Houses to compel inquiries into private affairs, and to punish as contempt a refusal to disclose such affairs, in any other class of cases than those in which the Constitution bestows upon the Houses, respectively, special and express judicial powers, such as those enumerated in paragraph 1 of the syllabus in the Kilbourn case, not merely by a just interpretation of the decision in the Kilbourn case, but also by what is stated in regard to the doctrines of that decision by the highest authority.

For example, in 2 Hare on the Constitution (top p. 855), that author, speaking of the doctrine of the Kilbourn decision, says:

"This doctrine may be regarded as *established* that the legislatures of the States are under the same disability as Congress, and can not, consistently with the Fourteenth Amendment, compel the attendance or production of witnesses or papers in *in any matter which affects private rights*, although the Government is also a party in interest."

Then, again, in the recent posthumous work of the late Justice Miller, the author of the opinion in the Kilbourn case, and which work embraces ten of his carefully written and revised lectures on the Constitution, delivered before the Law School of the Columbian University of this District, and which is edited by J. C. Bancroft

Davis, is found a careful review and compact statement of what was decided in the case of Kilbourn *v.* Thompson. It is an opinion in which Justice Miller took some justifiable pride, and which he says has had the effect of reversing and correcting the practice regarding the invasion of private rights by committees, throughout the States of this Union. After stating generally the character and doctrines of the Kilbourn case, Justice Miller sums up the entire effect and substance of that decision, so far as it relates to the vital question in the present case, to wit, the right of legislatures and their committees, and the Houses of Congress to pry into the private affairs of citizens and to compel the disclosure thereof by giving testimony or producing papers, in the following unmistakable terms, found at page 415 of said work, and speaking of what was held in the Kilbourn case:

"It was held that neither House had any right to organize an investigation into the private affairs of a citizen, and, except in a case in which the Constitution *expressly* conferred upon one body or the other powers *which were in their nature judicial*, and which *required* an examination of witnesses, they possessed no power to compel by fine or imprisonment, or both, the attendance of such witnesses and answers to interrogatories which did not relate to some question of which it had jurisdiction."

Here, then, is an authoritative statement coming from the author of the opinion in the Kilbourn case, asserting, in so many words, that neither of the Houses had power to compel the disclosure of private affairs by witnesses subpœnaed before a committee "except in a case in "which the Constitution expressly conferred upon one "or the other powers which were in their nature judi-"cial," and which judicial powers required the examination of witnesses.

Contempt Proceeding Must Take on the Definiteness of Judicial Prosecution.

Our next proposition is closely kindred to our first proposition, and is that, when a legislature is proceeding in a prosecution for contempt, it must give to its proceedings the definiteness and other characteristics of a judicial prosecution, in a court, for a crime.

Contempt of court, or any other body entitled to punish for contempt, is a specific *criminal offence*. This is expressly decided in *New Orleans* v. *Steamship Co.* (20 Wall., 387, 392). See, also,

Hayes v. *Fisher* (102 U. S., 122);
Ex parte Kearney (7 Wheaton, 39);
Coggin v. *Boies* (34 Fed. Rep., 699).

The obvious purpose for which we have thus established the proposition that a contempt proceeding in a court or in a legislature is a proceeding distinct from the body of the case as to which the contempt may have been committed, and is an *independent* and a *criminal* proceeding, is to fix upon this proceeding the legal requirement applicable to all criminal proceedings, to wit, that every accusation must be definitely, distinctly, and affirmatively set forth in the Record and must be established by the evidence, and this especially in courts of limited jurisdiction.

Nothing can be conceived of more abhorrent to the principles of our law than the idea that a party may be prosecuted for contempt without being permitted to know the grounds upon which the court claims the right to punish him, or the grounds upon which it bases its right *to demand the disclosure of his private affairs.*

That the court prosecuting him shall be *presumed* to have good and sufficient reasons for demanding that to be done, the non-doing of which constitutes the alleged contempt, is a position at war with all just law and shocking to the very instincts of civil liberty. And yet it will appear, as we proceed in this discussion, that it was precisely on this ground, to wit, that it will be *presumed, without averments so alleging*, that the Senators, in asking said questions, had good and, in law, sufficient reasons for asking them; and had such as brought the questions within the jurisdiction of the Senate that the court below based its decision against the defendants.

We now turn to some of the authorities more distinctly and exactly in refutation of said last-named position of the court below.

In what we have stated above from the said case *In re Pacific Railway Commission* (32 Fed. Rep., 250), asserting that "in the pursuit of knowledge, it (the commission) "can not compel the production of private books and "papers (and, of course, not the exposure of the private "business and affairs of the citizen, p. 251), except in the "progress of judicial proceedings, or in suits instituted "for that purpose, and in *both* cases only upon averments "that its rights are, in some way, *dependent*, for enforce-"ment, upon the evidence those books and papers con-"tain," it results that every prosecution for contempt is not only a criminal prosecution, but it is one that can only be prosecuted in a court, or in a body, such as a legislative body, having to a limited extent the powers of a court. (*See 103 U. S., bottom of page 197*).

This principle being kept in mind, we turn to a preliminary statement which becomes here appropriate, namely, that the Senate is, in the exercise of its powers to punish for contempt, a court, but one of "very limited" and special jurisdiction.

Indeed, it is thoroughly settled that *all* the courts of the United States are courts of *limited and special* jurisdiction, and proceedings in such courts must disclose, on the face of the pleadings, the facts necessary to constitute jurisdiction. (*Kemp's Lessee* v. *Kennedy*, 5 Cranch, 173.)

But it is not merely in this sense so applicable to all courts of the United States, as between the jurisdiction of such courts and the jurisdiction of the State courts, that we here appeal. It is to the altogether more conclusive fact that the Senate, in matters judicial, is a court of the *very* limited, restricted, and special jurisdiction, and that, in order to show its proceedings to be within its jurisdiction, *every* fact necessary to show that the case, being prosecuted, belongs to one of these special and limited classes, must appear.

This is most obviously so upon the general principles applicable to such matters, and really hardly needs discussion. Yet it has been the subject of the most careful discussion. In the case of *Kilbourn* v. *Thompson* (103 U. S., 168), in the fourth paragraph of the syllabus, this is most distinctly announced in these words:

"Neither House of Congress was *constituted a part of any court of general jurisdiction*, nor has it any history to which the exercise of *such* power can be traced. Its power must be sought alone in some express grant in the Constitution, or be found necessary to carry into effect such powers as are there granted."

At the bottom of page 181, when the court comes to this point, its language is:

"Conceding for the sake of argument that there are cases in which one of the two bodies that constitute the Congress of the United States may punish for contempt of its authority, or disregard of its orders, it will scarcely be *contended by the most ardent* advocate of their power, in that respect, that it is *unlimited*."

Then, after quoting the provision of the Constitution which reserves all non-granted powers to the States and the people, the court says:

"No *general* power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that no 'person shall be deprived of life, liberty, or property without due process of law,' the *strongest* implication against punishment by order of the legislative body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the Constitution."

At the bottom of page 189, the court repeats that it does not find it necessary to decide, in the present case, whether Congress can punish one for contempt in failing to answer questions shown to be needed to aid in *legislation*, and, near the bottom of page 190, says:

"Whether the power of punishment in either House goes beyond *this* or not" (that is, beyond the enforcement of the judicial powers named in paragraph 1 of the head notes), "*we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire; and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.*"

The court then proceeds to state the dividing line between the powers entrusted to the three departments of the Government, to wit: the legislative, judicial, and executive. Again and again, throughout the opinion, the court breaks forth in the inquiry (as, for example, on page 195): "What authority has the House to enter upon

"this investigation into the *private affairs* of individuals "who hold no office under the Government?" On page 197, near the bottom, the court says:

"But we do not concede that the Houses of Congress possess this *general* power of punishing for contempt. The cases in which they can do this are *very* limited, as we have already attempted to show. If they are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown, and we can not give our assent to the principle that, by the mere act of *asserting* a person to be guilty of contempt, they thereby establish their right to fine and imprison him beyond the power of any court or other tribunal whatsoever to inquire into the grounds on which the order was made. This necessarily grows out of the nature of *an authority which can only exist in a limited class of cases, or under special circumstances;* otherwise the limitation is unavailing and the power omnipotent. The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry when the judgment is relied on in any other proceeding."

The court cites—

Williamson v. *Berry*, 8 How., 495;
Thompson v. *Whitman*, 18 Wall., 457;
Knowles v. Gas Light & Coke Co., 19 Wall., 58;
Pennoyer v. *Neff*, 95 U. S., 714.

This principle, that "the cases in which they" (the Houses of Congress) "possess this power of punishing "for contempt are *very limited*," being fixed in the case at bar—as it assuredly is, if by authority or reason anything can be fixed in this case—we turn to the question whether, in deciding upon the jurisdiction of the Senate, a court of very limited jurisdiction, the Record must *affirmatively* show all the facts necessary to create its jurisdiction so to adjudge; and whether any of these facts will, as the court below held, be *presumed*, in the total absence of averment to that effect.

In 12 American & English Encyclopædia of Law (p. 274) is a statement of our present proposition, and a citation of authorities, as follows:

"Note 2. The facts which must be shown to exist before the matter can be within the jurisdiction of an inferior court, and which can be inquired into collaterally, are such as, in the absence of which, the court can not rightfully hear and determine any question touching the matter in controversy. *Staninan* v. *Davis*, 1 Salk., 404; *Kempe's Lessee* v. *Kennedy*, 1 Pet., 30; *Commissioners* v. *Thompson*, 26 Ala., 568; *State* v. *Ely*, 43 Ala., 568; *Hall* v. *Howd*, 10 Conn., 514; *Proctor* v. *State*, 5 Harr, Del., 387; *Gray* v. *McNeal*, 12 Ga., 424; *Chicago* v. *Rock Island Railroad*, 20 Ill., 286; *Commissioners* v. *Markle*, 46 Ind., 96; *Gay* v. *Lloyd*, 1 G. Green, Iowa, 78; *Wight* v. *Warner*, 1 Doug., Mich., 384; *State* v. *Metzgar*, 26 Mo., 65; *Bergen Turnpike Co.* v. *State*, 1 Dutch., N. J., 554; *People* v. *Kocher*, 7 Hill, N. Y., 39; *Clyde, &c., Plank Road Co.* v. *Parker*, 22 Barb., N. Y., 323; *Norwegian Street*, 81 Pa. St., 349; *Barrett* v. *Crane*, 16 Vt., 246."

The same thing is expressly held in the recent case of *Runkle* v. *United States* (122 U. S., 555). The following extract from the opinion of the court, by the Chief Justice, in that case is conclusive:

"A court-martial, organized under the laws of the United States, is a court of special and limited jurisdiction. It is called into existence for a special purpose, and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. (3 *Greenl. Ev.*, sec. 470; *Brooks* v. *Adams*, 11 Pick., 441, 442; *Mills* v. *Martin*, 19 Johns., 7, 30; *Duffield* v. *Smith*, 3 S. & R., 590, 599.) Such also is the effect of the decision of this court in *Wise* v. *Withers*, 3 Cranch, 331, which, according to the interpretation given to it by Chief-Justice Marshall in *Ex Parte Watkins*, 3 Pet., 193, 207, ranked a court martial as one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. To give effect to its sentences, it must appear affirmatively and unequivocally that the court was legally

constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. (*Dymes* v. *Hoover*, 20 How., 65, 80; *Mills* v. *Martin*, 19 Johns., 33.) *There are no presumptions in its favor so far as these matters are concerned.* As to them, the rule announced by Chief-Justice Marshall in *Brown* v. *Keen*, 8 Pet., 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: '*The decisions of this court require that averment of ju-*
'*risdiction shall be positive; that the declaration shall state*
'*expressly the fact on which jurisdiction depends. It is not*
'*sufficient that jurisdiction may be inferred, argumentatively,*
'*from its averments. Their authority is statutory, and the*
'*statutes under which they proceed must be followed through-*
'*out. The facts necessary to show their jurisdiction and*
'*that their sentences were conformable to law, must be stated*
'*positively, and it is not enough that they may be inferred*
'*argumentatively.*'"

The same thing will be found in—

2 Freeman on Judgments, sec. 527, and cases cited;
Grignon's Lessee v. *Astor*, 2 How., 319, 341;
Peacock v. *Bell*, 1 Saund., W'ms Ed.), 73–4;
Byrd v. *State*, 1 How. (Miss.), 163, 173;
Harvey v. *Tyler*, 2 Wall., 340;
Cooley Const. Lim., 4 Ed., 508–9, and Note;
1 Bishop Crim. Procedure, Note 3, sec. 236;
1 Bishop on Crim. Procedure, sec. 1169.

See, also, 10 Conn., 514; 127 Mass., 474; 89 Ind., 422; 67 Md., 250; 105 Mass., 23; 2 Gray, 115; 4 Metcalf, 421; 18 Vt., 594; 12 Vt., 431.

The substance of all these decisions, just cited, as applied to the case at bar, is obviously this, that since there is nothing, either in the resolution, or elsewhere, authorizing the committee to make the investigation going to show that the results of the investigation were needed or to be used by Congress, or either House thereof, in exer-

cising the judicial functions named in the first paragraph of the syllabus in the case of Kilbourn *v.* Thompson, or in framing and adopting legislation, and since, moreover, the private affairs of a citizen can not be wrested from him and made bare to the public unless one or the other of these two needs or purposes exists in the case, and is "avowed" in the resolutions directing the investigation, and justifies the compulsory disclosure of these private affairs and justifies punishment for contempt for persistent refusal to answer, and since the law is, as applied to a court of limited jurisdiction, like the Senate, that which is quoted by Chief-Justice Waite from the opinion of Chief-Justice Marshall, namely, that—

"The decisions of this court require that averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction *may be interred argumentatively*, from these averments. * * * The facts necessary to show their jurisdiction, and that their sentences were conformable to law must be stated positively, and it is not enough that they may be inferred argumentatively,"—

therefore the committee was wholly without power or jurisdiction to compel the disclosure of the private affairs of the citizen, as the indictment shows these defendants were required to disclose their private business.

Precisely here is the body and law of our case.

Holding Below that Jurisdictional Facts Will, Without Averment, be Presumed.

But the court below refused to so hold. On the contrary, it held that this citation, which we make from the case of Runkle, and all the authorities like it, are ancient law, and these were, by the court below, in effect, overruled or disregarded as inapplicable.

Reliance of the Court Below on the Case of the People *ex rel.* McDonald *v.* Keeler.

The decision of the Court of Appeals of New York in the case of *People ex rel. McDonald* v. *Keeler* (99 N. Y., 463), is the one which the court below relied on (*R., p. 22*) in refusing to follow the doctrines of Chief-Justice Marshall, and of the Supreme Court of the United States, as set forth in what we have above quoted from the Runkle case (*supra*), holding that no presumptions in favor of jurisdiction can be indulged where the proceeding is a special one and in a court of special and limited jurisdiction.

The court below read (*R., p. 23*) in support of its position that jurisdictional facts will be presumed in the absence of averment, the passage which is found at page 487 (99 N. Y.), and which reads as follows:

"We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume the contrary was intended."

Let us now carefully look at the view taken by the court below, in this case, of what the court below admitted (*R., p. 23*) to be expressly decided, as appears by the face and letter of the decision in this New York case. The following is the language of the New York court regarding the class of investigations in which it is there held, explicitly, that there exists no right to compel a witness to answer questions which he is protected by the general provisions of the law from answering (99 N. Y., 485):

"*An investigation, instituted for the mere sake of investigation, or for political purposes, not connected with intended legislation, or with any of the other matters upon which the*

House could act, but merely intended to subject a party or body investigated to public animadversion, or to vindicate him or it from unjust aspersions, where the legislature had no power to put him or it on trial for the supposed offenses, and no legislation was contemplated, but the proceeding must necessarily end with the investigation, WOULD NOT, IN OUR JUDGMENT, BE A LEGISLATIVE PROCEEDING, OR GIVE TO EITHER HOUSE JURISDICTION TO COMPEL THE ATTENDANCE OF WITNESSES, OR PUNISH THEM FOR REFUSING TO ATTEND."

Then, in the same case, the New York court (p. 483, *et seq.*) holds what the Supreme Court of the United States refused to decide, namely, that a witness could be punished for contempt for refusing to answer where the object of the investigation was to aid in pending or contemplated legislation.

Both of these classes of investigation are in the case of Keeler expressly and distinctly marked out as existing classes, in one of which answers could not be compelled where the witness was unwilling, and where no legislative action was to be based on the result of the investigation; and in the other, that answers could be compelled where such action was contemplated.

Now, what the court held as to these two classes was, that if the Record was silent as to which class the one being prosecuted belonged to, it would be *presumed* that it belonged to the class where answers could be compelled, and the witness imprisoned for refusing to answer; that is, held that an essential jurisdictional fact, not shown to exist by the Record, namely, that legislative action was to be based on the result of the investigation, would be *presumed*.

The falsity of this position (aside from its flagrant defiance of all authority forbidding presumptions, in the absence of averment, in favor of crime), is seen in the fact that, having *assumed* that, in the absence from the Record of any fact going to show that it belonged to that

class in which answers could be compelled and punishment for contempt inflicted, and did not belong to the class where this could *not* be done, the witness is *thereupon*, and owing to this *presumption*, compelled to answer questions which he could not lawfully be required to answer if the investigation belonged to that class named in the above extract, and which class had been, for the purpose of compelling an answer, *presumed out of the case*.

What, then, after such compulsion, becomes of that part of the law here laid down by the court which holds that a witness ought not, and could not be compelled to answer should the investigation *turn out* to belong to the other class, namely, the class where such legislative action is *not* contemplated, and where, therefore, punishment for contempt in not answering could not be inflicted. It turns out afterwards, and at the end of things, that the investigation belongs to the class where no action, based on the investigation, was contemplated, and where, therefore, answers could not be compelled. But now, when this is discovered, the innocent victim of a presumption has already suffered the penalty of the law—this for not answering in a case where the law, as laid down even in this New York case, excuses him from making answer.

So far as we can see and understand, these conflicting positions attributed by the District Attorney to the New York court have no equivalent, in the way of absurdity, unless it be the ancient test by which witches were tried, namely, by throwing them into a horse pond. If they did not succeed in rescuing themselves, and were drowned, then they were *not* witches, and were to go acquit of the charge, but go dead. If, however, they succeeded in escaping from the pond, then they were witches, and were executed. Under this decision, it made no difference whether a witness was guilty or innocent, for, in either event, he was to be punished for contempt in failing to

answer. And this is the position attributed by the other side to this decision of the Court of Appeals of New York.

Another absurdity involved in this decision is in assuming that guilt will be presumed in the absence of all averment going to charge guilt.

In what we have now stated going to show the absurdities involved in this New York decision, we do not mean to say that they are all really there; but only that they are there according to what is attributed, by the Government, to the New York court in that case. We are inclined to think that the New York court saw, in that case, such conclusive and affirmative averment of the jurisdictional fact, to wit, that legislative action was intended to be based upon the report of the committee, as delivers the decision from such absurdities, and from indulging in presumptions of guilt. We also incline to think that the court, in what it said about presumptions (and which in no view, can be excused as not involving palpable error), based it upon what the court has italicised, in the resolution under which the New York committee acted (*p. 486*), namely, *that the committee was required to report its recommendations concerning the same to the Senate.*

If this is equivalent to an affirmative and positive averment that legislative action was to be based upon the report of the committee (and it is not so equivalent—see Runkle's Case), then what the New York court said about "presumptions" *was outside of the Record*, and the decision of the court, in that view, is delivered from most, if not all, of its absurdities.

Contrast of the Kilbourn Resolution with the Present One.

We now proceed to show, in another, and, in the main, distinct view, that it is impossible to hold that presump-

tions will be made in favor of the jurisdiction of the Senate in the case at bar, such as would create power and jurisdiction to ask the questions set forth in the indictments, answers to which were refused. We present this other view by laying before the court condensed statements of what was decided in the case of *Kilbourn* v. *Thompson* (103 U. S., 168), which shows that if the answers to the questions asked of Kilbourn could lawfully be refused, then, *a fortiori*, can these be refused in the case at bar without liability to punishment for such refusal.

The following syllabus of the report in *Kilbourn* v. *Thompson* (103 U. S., 168), is by far the most compact and yet accurate synopsis of the entire decision which has come to our notice. It is as follows:

"1. K., for refusing to answer certain questions put to him as a witness, by the House of Representatives of the Congress of the United States, concerning the business of a real-estate partnership of which he was a member, and to produce certain books and papers in relation thereto, was, by an order of the House, imprisoned for forty-five days in the common jail of the District of Columbia. He brought suit to recover damages therefor against the Sergeant-at-Arms, who executed the order, and the members of the Committee who caused him to be brought before the House, where he was adjudged to be in contempt of its authority. *Held*, That although the House can punish its own members for disorderly conduct, or for failure to attend its sessions, and can decide cases of contested elections, and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the Government, and may, where the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness, there is not found in the Constitution of the United States any *general* power vested in either House to punish for contempt.

"2. An examination of the history of the English Parliament and the decisions of the English courts shows that the power of the House of Commons, under the laws and customs of Parliament, to punish for con-

tempt rests upon principles peculiar to it, and not upon any general rule applicable to all legislative bodies.

"3. The Parliament of England, before its separation into two bodies, since known as the House of Lords and the House of Commons, was a high court of judicature—the highest in the realm—possessed of the general power, incident to such a court, of punishing for contempt. On its separation the power remained with each body, because each was considered to be a court of judicature and exercised the functions of such a court.

"4. Neither House of Congress was constituted a part of any court of *general* jurisdiction, nor has it any history to which the exercise of such power can be traced. Its power must be sought alone in some express grant in the Constitution, or be found necessary to carry into effect such powers as are there granted.

"5. The court, without affirming that such a power can arise in any case other than those already specified, decides that it can exist in no case where the House, attempting to exercise it, invokes its aid in a matter to which its authority does not extend, such as an inquiry into the private affairs of the citizen.

"6. The Constitution divides the powers of the Government which it establishes into the three departments—the executive, the legislative, and the judicial—and unlimited power is conferred on no department or officer of the Government. It is essential to the successful working of the system that the lines which separate those departments shall be clearly defined and closely followed, and that neither of them shall be permitted to encroach upon the powers exclusively confided to the others.

"7. That instrument has marked out, in its three primary articles, the allotment of power to those departments, and no judicial power, except that above mentioned, is conferred on Congress or on either branch of it. On the contrary, it declares that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish.

"8. The resolution of the House, under which K. was summoned and examined as a witness, directed its committee to examine into the history and character of what was called 'the real estate pool' of the District of Colum-

bia; and the preamble recited, as the grounds of the investigation, that Jay Cooke & Co., who were debtors of the United States, and whose affairs were then in litigation before a bankruptcy court, had an interest in the pool or were creditors of it. The subject-matter of the investigation was judicial, and not legislative. It was then pending before the proper court, and there existed no power in Congress, or in either House thereof, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and consequently no authority to compel a witness to testify on the subject.

"9. It follows that the order of the House, declaring K. guilty of contempt of its authority and ordering his imprisonment by the Sergeant-at-Arms, is void, and affords the latter no protection in an action by K. against him for false imprisonment.

"10. *Anderson* v. *Dunn* (6 Wheat., 204), commented on and some of the reasoning of the opinion overruled and rejected."

We now place in this brief a full copy of the resolution of the House in the Kilbourn case found at page 171 of 103 U. S., which reads as follows:

"*Whereas*, the Government of the United States is a creditor of the firm of Jay Cooke & Co., now in bankruptcy by order and decree of the District Court of the United States in and for the Eastern District of Pennsylvania, resulting from the improvident deposits made by the Secretary of the Navy of the United States with the London branch of said house of Jay Cooke & Co. of the public moneys; *and whereas*, a matter known as the real-estate pool was only partially inquired into by the late joint select committee to inquire into the affairs of the District of Columbia, in which Jay Cooke & Co. had a large and valuable interest; *and whereas*, Edwin M. Lewis, trustee of the estate and effects of said firm of Jay Cooke & Co., has recently made a settlement of the interest of the estate of Jay Cooke & Co. with the associates of said firm of Jay Cooke & Co., to the disadvantage and loss, as it is alleged, of the numerous creditors of said estate, including the Government of the United States; *and whereas*, the

courts are now powerless by reason of said settlement to afford adequate redress to said creditors—

"*Resolved*, That a special committee of five members of this House, to be selected by the Speaker, be appointed to inquire into the *matter and history* of said real-estate pool, and the character of said settlement, with the amount of property involved in which Jay Cooke & Co. were interested, and the amount paid, or to be paid, in said settlement, with power to send for persons and papers and report to this House."

We now add a full and exact copy of the Senate resolutions in the present case taken from the indictments, omitting only the innuendoes of the indictments, which, of course, add nothing to the scope of the committee's authority. The resolution is in the following words:

"*Whereas*, it has been stated in the *Sun*, a newspaper published in New York, that bribes have been offered to certain Senators to induce them to vote against the pending tariff bill; and

"*Whereas*, it has also been stated in a signed article in the *Press*, a newspaper published in Philadelphia, that the sugar schedule has been made up as it now stands in the proposed amendment in consideration of large sums of money paid for campaign purposes of the Democratic party; *therefore*,

"*Resolved*, That a committee of five Senators be appointed to investigate these charges, and to inquire further whether any contributions have been made by the Sugar Trust, or any person connected therewith, to any political party for campaign or election purposes, or to secure or defeat legislation, and whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate, and with power to send for persons and papers, and to administer oaths.

"*Resolved further*, That said committee be authorized to investigate and report upon any charge or charges which may be filed before it alleging that the action of any Senator has been corruptly or improperly influenced in the consideration of said bill, or that any attempt has been made to so influence legislation."

We here place these resolutions, to wit, that in the Kilbourn case and that in the case at bar, together for the purpose of carefully contrasting the two; and we ask, upon a general view of the character and contents of each of them, what it is that is in the resolution in the case at the bar that opens, to the gaze of the whole public, the private affairs of any and all the citizens of the United States, and which is *absent* from the resolution in the Kilbourn case; and which latter resolution was unanimously held not to allow any inquiry into such private affairs.

So far as relates to the enforced disclosure of private affairs and business, each of these resolutions is alike, each seeking to inquire into private affairs. If, in this regard, there is any difference, it is that, in the Kilbourn case, the private affairs sought to be inquired into were alleged to have been fraudulent, or at least unjust and wrongful; whereas in the case at bar no such accusation, regarding the private affairs sought to be inquired into, is made. On the contrary, it is confessed that the affairs asked for were, in any and every view, so far as these defendants are concerned, lawful and legitimate. If this difference between the resolutions in the Kilbourn case and the case at bar is material, it certainly operates in favor of excluding the disclosure in the present case more strictly than in the Kilbourn case.

Again: in the case at bar, it is impossible fairly to contend that there is anything in the present resolution indicating a desire or purpose on the part of Congress to use the result of the investigation, or the answers to the questions stated in the indictments, for the purpose of aiding in the exercise of any one of the judicial functions of the Senate which are named in the first paragraph of the syllabus to the Kilbourn case. Not only is there nothing in the second resolution authorizing an investi-

gation of the question whether any Senator's vote was improperly influenced if charges to that effect should not be filed, but, on the contrary, the requirement in that second resolution that such investigation of improper influence could only be made upon any charge or charges which might be filed before the committee, is a direct *negative* of the idea that any prosecution of a Senator was contemplated, or was to be attempted, in the absence of charges, to the effect that senatorial action had been corruptly or improperly influenced, thereafter filed before the committee.

It is simply evident that this provision, which is the only one looking to a proceeding against a Senator for his conduct touching the sugar schedule, is equivalent to a *prohibition* of any investigation directed against a Senator, or looking to his punishment, in the absence of specific charges filed before the committee. If any authority is needed in support of this, direct authority is to be found in the case *In re Heath* (144 U. S., 93), where the court says: "The general rule is that the affirmative "description of the cases *in which jurisdiction may be ex-* "*ercised implies a negative on the exercise of such power in* "*other cases.*"

It would be quite useless for us to extend the discussion of the two resolutions in the case at bar for the purpose of showing that they contain *no* affirmative indication, or hint, even, that the investigation was resorted to in aid of the said judicial functions of the Senate, or of its legislative functions. There is no such indication, or even hint, in either of said two resolutions. On the contrary, as we have just seen, the second resolution prohibits any investigation mentioned in it except upon and after specific charges filed with the committee—and none were filed; and the preamble to the first resolution expressly declares the motive, object, and inducement which prompted

its passage, namely, that it was passed because of the publications named in the preamble—one as to bribery, published in the New York *Sun*, and the other as to the authorship of the schedule found in the amendment to the tariff bill, published in the Philadelphia *Press*. The preamble expressly asserts that it was because of these two publications that the investigation was ordered—this by adding, after its reference to said publication, that, "*Therefore*," the resolution was passed.

Like as was said by the Supreme Court of the United States in the case of Heath (*supra*), the expression of one ground of jurisdiction is a negative of other grounds; so when the resolution declares that it was adopted because of these newspaper articles, it thereby declares that this is the real and sole ground of investigation. It was resorted to, just as is stated in the quotation above made from the case of *The People* v. *Keeler*, "for political purposes," and was intended to vindicate the parties responsible for the make-up of the tariff bill from the charges made by the Philadelphia *Press*, and to clear up the *Sun's* allegation regarding bribery. *This was a very proper and legitimate object and purpose of investigation*, and it is the one which the Senate itself assigns as the ground, and the only ground, aim and purpose of the investigation.

These considerations conclusively show that the object of the resolution was to counteract and defeat a scandal started by the said journals, and to direct an investigation *in the event that charges were thereafter filed* accusing Senators of being improperly influenced regarding the tariff bill. This, we submit, is absolutely conclusive of the fact that nothing appears in this Record going affirmatively to show that the questions set out in the indictments were asked in aid of the exercise of the judicial functions of the Senate, or in aid of its legislative powers.

No Presumptions in Favor of Guilt.

If, therefore, it is to be decided that this investigation looked to the aid of either the legislative or the judicial functions of the Senate, then such conclusion must be reached by sheer and mere *presumption*, in the absence of all facts favoring or supporting it, except the fact that the investigation was ordered; and moreover, reached in defiance of the express declaration of the resolutions to the contrary!

We have already noticed what was said by the court below in a quotation from the case of *The People ex rel. McDonald* v. *Keeler* (99 N. Y., 463), regarding "presumptions," to wit:

> "We are bound to *presume* that the action of the legislative body was with a *legitimate object, if it is capable of being so construed*, and we have no right to assume that the contrary was intended."

We have also conclusively shown—if the authority of the recent decisions of the Supreme Court of the United States is to have weight here, and are not to be overruled as "ancient history"—that the proceedings of a court of limited jurisdiction, such as we have shown the Senate to be, in regard to its powers to punish for contempt, must *affirmatively show*, in its record, every fact essential to create jurisdiction to compel the disclosure of private affairs.

We have shown that, in order to punish for contempt, the Senate must be exercising one of its judicial functions named in said paragraph 1 of the syllabus of the Kilbourn-Thompson case, or else, *at least*, must be investigating in aid of its power and purpose to legislate; that these facts are jurisdictional and must be affirmed in order to create the power to punish for contempt.

We have also shown that in the resolution at bar neither

of the said two jurisdictional facts is affirmatively set forth, and that the opposite is; and we have shown what is thus expressed in the Runkle case, namely, that "the "decisions of this court (the Supreme Court of the United "States) require that averment of jurisdiction shall be "positive—that the declaration shall state expressly the "fact on which jurisdiction depends. It is not sufficient "that jurisdiction may be *inferred argumentatively* from its "averments. . . . That *there are no presumptions in "favor of jurisdiction so far as these matters are concerned.*"

These considerations we have heretofore regarded, and still regard, as absolutely conclusive that the committee had no jurisdiction, under the authority given it by the Senate, to attempt this invasion of the private affairs of the defendants, which is set out in the indictments. Here we thought we could safely rest the whole case, but now this doctrine that the jurisdictional facts requisite in order to create jurisdiction in the Senate to punish for contempt will be *presumed*, is brought into the case; and we wish to add some suggestions in reply to this position.

Remember that the quotation which we make from the Court of Appeals of New York is one which, in substance, asserts that, if the questions asked relate to a matter as to which a legitimate object or purpose to legislate is *capable* of being attributed, then the presumption is that the investigation was instituted in order to aid that supposable legitimate object. And, indeed, in the nature of the case, such *must* be the scope of the presumption in order to be available in the case at bar.

Now, we assert that if this newly-discovered doctrine of presumptions against the citizen, and in favor of invading his sacred private rights, is to be followed to its necessary and logical results, there is not in existence a single home or house, not a hearth or bed-chamber, not a private office or workshop in the land that is not open to the gaze, and put at the mercy, of any one who can

secure, in Congress, the adoption of an order to investigate.

This is so, simply because there is manifestly no subject-matter of which it can be said that *no* pertinent and appropriate legislation by Congress is possible, and which could be aided or have light thrown upon it by the results of the investigation. Let the members of this court, for example, test, in their own thoughts, what we have just said, and think of subjects, ordered to be investigated by Congress, of which it would be possible to assert, affirmatively, that no legislation or action by Congress could be resorted to bearing upon it, and which the investigation could by possibility, aid in determining upon. Suppose you take some of the most remote and unlikely subjects, as, for instance, the present private indebtedness of the people of the States; or the public indebtedness of the States; or the indebtedness of the municipalities in the United States; or the condition of the roads in the various States; or the state of the public health in the various sections of the Union; or the prevalence of infectious diseases amongst men or animals; or the question of the strength and durability of the different monarchies of the world; or the question as to which is right in the present war between China and Japan, or any other conceivable subject. It can not be predicated of any of them that no legislation, or other legitimate action by Congress, is possible which could be aided and enlightened by proper investigation.

It is, therefore, literally true that if this doctrine of *presumption* is to be applied, and every one who can secure the adoption of a resolution to investigate is to be licensed to compel, under the pains and penalties of imprisonment, the disclosure of private affairs bearing upon the subject under investigation, with liberty to pursue it as far as his sense of public duty, or his prurient curiosity, or his greed, or his malice, or his revenge, may

impel him to go, then we have in this country no possible private home, "castle," sanctuary, or retreat; and this, the most valued and most sacred safeguard of civil liberty, is absolutely a delusion and a snare.

When Judge Cooley teaches us (*Constitutional Limitations, t. p. 367, s. p. 299*) that it is even "a maxim of the "common law which secures to the citizen immunity in "his home against the prying eyes of the Government, "and protection in person, property and papers against "even the process of the law, except in a *few specified* "*cases*," that "every man's house is his castle," and that "this is a part of our constitutional law found in the "clauses prohibiting unreasonable searches and seiz-"ures;" that "the poorest man may, in his cottage, bid "defiance to all the forces of the crown; that it may be "frail; its roof may shake; the wind may blow through "it; the storm may enter; the rain may enter, but the "King of England may not enter; all his forces dare "not cross the threshold of the ruined tenement;" he therein and thereby utters an unalleviated lie; and, besides, is guilty of resorting, in a sober law book, to the merest fustian, if the ruling of the court below on this subject is sound.

We shall come again to this point as to the jealousy with which our Constitution and laws protect private homes and affairs from invasion.

Presumptions were not Allowed to Create Jurisdiction to Imprison in the Kilbourn Case.

We now turn to a more full and direct inspection of the Kilbourn case to see whether the court there sanctions the doctrine that it will be presumed, in the absence of averment, that that investigation was ordered for some conceivable or possible legitimate action thereon by Congress.

In the court below, as already said, it was, in substance, alleged, quoting from the case of *People* v. *Keeler*, that if there was *any conceivable* action of Congress that *could* be aided by the result of the investigation, then it must be *presumed* that the investigation was resorted to for the purposes of that aid.

Was this doctrine applied to the Kilbourn case?

Most palpably not.

Take, first of all, the matter of impeaching the Secretary of the Navy because of his conduct, condemned in the resolution, in "improvidently" depositing United States funds in Jay Cooke & Company's London branch. Now, we beg to be informed, if this doctrine is correct that a legitimate object, if any is possible, will be presumed, why it was that the court was not bound to presume that one legitimate object of the resolution was to present against the Secretary articles of impeachment, this being a matter directly within the jurisdiction of the House?

Instead of presuming that articles of impeachment were, in ordering the investigation, aimed at, the court expressly refuses to so presume, and says (bot. p. 193):

"*If, indeed, any purpose had been avowed to impeach the Secretary the whole aspect of the case would have been changed. But no such purpose is disclosed. None can be inferred from the preamble, and the characterization of the conduct of the Secretary by the term 'improvident' and the absence of any words implying a suspicion of criminality, repel any such purpose, for the Secretary could only be impeached for high crimes and misdemeanors.*"

Here it is not only stated affirmatively that had the purpose to impeach been "*avowed*" in the resolution, the questions asked of Kilbourn would have been competent, but there is also added to that the declaration that there is an *absence* of any words implying a suspicion of criminality that repels the idea of such purpose. This

language is unmistakably plain in its indication that an "*avowed purpose*" must be present in the authority given to the committee to resort to the exercise of one of those judicial powers of the House, or else no such implication will be allowed to arise in order to compel the disclosure of private affairs. Instead of presuming the intent to use the investigation in aid of the functions of the House, the very opposite is here expressly asserted, to wit, that there must be an avowed intent or disclosure so to use the investigation.

Or take this view of the Kilbourn case: This new doctrine of presumptions in favor of guilt asserts that if *any* legislation or judicial action, regarding the subject-matter embraced by the resolution, is conceivable or possible, then it must be presumed that the investigation was ordered for the purpose of aiding that action or legislation. Suppose this had been the view taken by the Supreme Court in the Kilbourn case. Will any lawyer on this continent, who is in his right mind, assert that no legislation could be conceived which would be constitutional and be appropriate in remedy of the mischief embraced in the Kilbourn resolution? Look at the legislation which was competent, without invading the separate powers of the judiciary, in this Kilbourn case.

For example, Cooley's Constitutional Limitations (s. p., 387, t. p. 351) declares that, "without impairing the obli-"gation of the contract, the *remedy* may certainly be modi-"fied as the wisdom of the nation shall dictate." So the Supreme Court of the United States in the case of *Gut* v. *Minnesota* (9 Wall., 37–8), holds that it was competent for Congress to pass laws changing the place of a trial. So it was competent for Congress to pass laws changing the class of persons who might testify in a pending case as held in *Hurst* v. *Utah* (110 U. S., 574, 589). So it was competent for Congress to pass laws creating new and additional remedies, such as attachment and imprisonment, or any

other legislation going merely to affect the *remedy*. So it was perfectly competent for Congress to pass an act authorizing some officer of the United States to compromise the case named in the Kilbourn resolution, so far as the United States was concerned.

Shall it be said that no one or more of these laws was constitutionally and legally *possible* to be enacted, and that no useful light could, by the pending investigation, be thrown upon the question of passing any one of these laws? Take, for illustration, the matter of authorizing a compromise. In innumerable cases special acts have been passed so authorizing the Attorney-General or some other officer to compromise suits in which the United States were concerned. A conspicuous example of this is found in the act approved June 9, 1880, entitled "an "act to authorize the compromise of the claims of the "United States under the will of Joseph L. Lewis." (21 Stats., 171.) There a bequest to the United States was made exceeding a million of dollars. A contest was instituted to break the will, and the Secretary of the Treasury and the Attorney-General were authorized, if they saw fit, to adjust or compromise the claim of the United States under said devise upon such terms and conditions as should be deemed by them fair and reasonable. And so it was compromised.

Can anybody assert that it was impossible that such a compromise may have been looked to in passing said resolution to investigate in Kilbourn? If it can not be so asserted, why did the court not "*presume*" that this was one object in passing the resolution?

Again. Take the case of the *United States* v. *Union Pacific Railroad Co.* (98 U. S., 569, 605, *et seq.*), decided in 1878, two years before the Kilbourn case, the opinion being by the same Justice that delivered the opinion in the Kilbourn case. That was a case that was most fully and ably argued by the very first lawyers of America,

and the question regarding the power of Congress to create special jurisdictions in the courts, there decided, is accurately indicated in the head notes, as follows:

"1. The act of March 3, 1873 (17 Stats., 509), is a valid and constitutional exercise of legislative power. Congress, by requiring the Attorney General to bring a suit in equity in the name of the United States in any Circuit Court against the Union Pacific Railroad Company and others, intended, *not to change* the substantial rights of the parties to the suits, but to provide a *specific* mode of procedure, which, by removing certain restrictions on the jurisdiction, process and pleading which are in other cases imposed, would give a larger scope to the action of the court, and a more economical and efficient remedy than before existed.

"2. The provisions authorizing process to be served without the limits of the district where the suit might be brought, and parties and subjects of controversy to be united which, in an ordinary chancery suit, would render a bill multifarious, are regulations of practice and procedure which are subject to legislative control.

"3. Statutes have been frequently passed directing suits for specific objects to be brought by an attorney general, and regulating the proceedings in them, such as a *quo warranto*, or a bill in equity against a corporation to test its right to the exercise of its franchises, or to declare them forfeited, or, if insolvent, to wind up its business and distribute its assets; and the validity of such statutes has uniformly been recognized."

Under this decision it was perfectly competent for Congress to pass a law ordering the Attorney General to bring a suit to enforce the rights of the Government *as they, in law and equity, existed*, in the matter covered by that resolution. At page 605 (98 U. S.), in the opinion, the court states as follows:

"But if this be otherwise, we are aware of no constitutional objection to the power of the legislative body to confer on an existing court a *special jurisdiction to try a specific matter* which in its nature is of judicial cognizance.

The principal defendant in this suit, the one around which all the contest is ranged, is a corporation created by an act which reserved the right of Congress to repeal or modify the charter. To this corporation Congress made a loan of $27,000,000, and a donation of lands of the value probably equal to the loan.

"The statute books of the States are full of acts directing the law officers to proceed against corporations, such as banks, insurance companies, and others, in order to have a decree declaring their charters forfeited. Special statutes are also common, ordering suits against such corporations when they have become insolvent, to wind up their business affairs and to distribute their assets, and prescribing with minuteness the *course of procedure* which shall be followed and the court in which the suit shall be brought.

"This court said, in the case of *The Bank of Columbia* v. *Okely* (4 Wheat., 235), in speaking of a summary proceeding given by the charter of that bank for the collection of its debts: '*It is the remedy, and not the right, and as such we have no doubt of its being subject to the will of Congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is inalienable so as to bind subsequent legislatures.*' And in *Young* v. *The Bank of Alexandria* (4 Cranch, 397), Mr. Chief-Justice Marshall says: 'There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, *and those peculiar remedies which may be bestowed on it.* The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate.' (See also *The Commonwealth* v. *The Delaware and Hudson Canal Co.*, 43 Pa. St., 227; *State of Maryland* v. *Northern Central Railroad Co.*, 18 Md., 193; *Colby* v. *Dennis*, 36 Me., 1; *Gowan* v. *Penobscot Railroad Co.*, 44 *Id.*, 140.)

"Statutes of this character, if not so common as to be called ordinary legislation, are yet frequent enough to justify us in saying that they are well recognized acts of legislative power uniformly sustained by the courts."

Observe in the above quotation what is said in the opinion cited from 4 Wheaton, 235, and also in that cited from 4 Cranch, 397, in regard to the power of Congress to deal with matters of mere remedy.

At page 608 (98 U. S.) it will be seen that the court remarks on the fact that the Attorney General *is peremptorily ordered* to bring this proceeding, and that was held competent and not to interfere with the province of the judiciary. At page 146 (18 Stats.) the Attorney General is peremptorily ordered to institute such prosecution as public justice may require in order to enforce the rights of the Government to the money involved in the bankruptcy of Henry D. Cooke, *or of Jay Cooke & Co.* This act was approved June 22, 1874, some two years before the adoption of the Kilbourn resolution. (See 103 U. S., 171.)

All such legislation as that which we have here pointed to was, as is seen by the syllabus which we have above quoted from the case of *United States* v. *Union Pacific Railroad Co.*, perfectly legitimate, constitutional, and in no way or degree *invading the powers and rights of the judiciary.* What we have quoted from the opinion of Justice Miller in said case is completely conclusive in favor of the constitutionality and competency of such legislation. There the court, as we have seen, states this matter as follows:

"It is the remedy, and not the right, and as such we have no doubt of its being subject to the will of Congress. The *forms* of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is inalienable so as to bind subsequent legislatures."

These citations and examples abundantly establish the proposition that if the court is bound to *presume* that the Kilbourn resolution was passed in order to aid in execut-

ing some judicial function of the Senate or some legislation that was constitutionally possible and conceivable, then it could not have decided, as it did, that no questions as to private business could be asked under the Kilbourn resolution.

It is to be carefully observed and kept in mind that, in so far as the opinion in the Kilbourn case comments upon the attempted invasion of the separate powers of the judiciary, as seen in the Kilbourn resolution, the court does not intimate, nor does it mean, that such legislation as we have above pointed out was not competent, and would be an invasion of the powers of the judiciary.

What the court does, in substance and effect, mean to say in that regard is, that it appeared to be the view of the House and committee that the object of the investigation was to take charge of the adjudication of the claim of the Government and of the actual collection of the debt owing to the United States, and named in the resolution, and to thus usurp the functions that belonged exclusively to the judiciary.

It was not the view of the court that laws providing new remedies or affecting remedies existing would constitute any such invasion of the province of the judiciary, or were not competent and appropriate to be enacted.

No; the exact truth is, as is shown by the entire scope of the opinion, that the reason why the court held that *aid*, in the exercise of the judicial or the legislative functions of the House, was not contemplated, in ordering the investigation, was not because no such aid was legally and constitutionally impossible; but was because no such aid to the functions of the House was "avowed" (103 U. S., 193,) as any part of the object of the resolution. Therefore a design to obtain, by means of said investigation, such aid to the exercise of the constitutional functions of the House could not be *presumed* or considered any part of such object, or used to give jurisdiction to inquire, under

the pains and penalties of imprisonment for contempt, into such private affairs.

It is thus rendered incontrovertibly plain and conclusive that this great case does not *stop* at deciding merely that a House of Congress can not delegate to one of its committees that power to adjudicate claims, and collect them, which the Constitution confers exclusively upon the courts, but is devoted, in its great aim and purpose, to settling the law to be that the private affairs of the citizen can not be invaded by investigations under the authority of the Houses of Congress, except under such limitations and restrictions and "vigilant watchfulness" (*p. 192*), as is uniformly and rigorously applied in the courts of the country in the defense of those rights which are secured by that principle of the common law now embodied in the Fourth and Fifth Amendments to the Constitution; and, further, that these limitations and safeguards, and this vigilance, prohibit the compulsory disclosure of private affairs, except where it is *affirmatively shown in the Record that the disclosure is essential to the enforcement, by the courts and houses of legislation, some specifically defined and recognized right, public or private, which the courts or the houses are bound to enforce, and the enforcement of which would be defeated, or at least jeopardized, if the enforced disclosure were not made.*

We submit these views of the Kilbourn case in absolute confidence that, if it is followed, the court must find that the committee was without jurisdiction or power to compel the defendants to disclose their private affairs under the facts and conditions appearing in the Record—was without jurisdiction or power for the same reasons that the committee was without jurisdiction and power in the Kilbourn case; the resolution in the case at bar not being broader in its conferment of power than the resolution in the Kilbourn case, and, indeed, for the reasons we have above stated, not near so broad.

Scope of the Kilbourn Decision.

Our allusions to this Kilbourn case have been, in the main, to show that this doctrine on which the demurrer was overruled below, namely, that it will be presumed that the investigation was ordered with the aim and purpose of aiding the Senate in executing some one or more of its constitutional functions, if any such aid was constitutionally conceivable or possible, could not have been the view of the Supreme Court in reaching its unanimous decision in that case, affirming that no disclosure of private affairs could be compelled under the authority of the Kilbourn resolution.

But it is proper now to beg the attention of the court to other bearings of that decision on the present case, which are, if possible, still more decisive in support of the demurrer.

It can not, of course, be denied, and is not denied, that the court directly and squarely met the broad question made by that case, namely, could Mr. Kilbourn, under the authority of that resolution, be compelled to disclose the private business which the committee then demanded of him? The court answered it directly, squarely, and without dissent, hesitation, or ambiguity—answered that he could not be so compelled; and that the asking of the question was beyond the jurisdiction and power of the committee, and that his imprisonment was unlawful.

On page 196, after a full review of the entire case, the court sums up its conclusions in the following words:

"We are of opinion, for these reasons, that the resolution of the House of Representatives, authorizing the investigation, was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that

the orders and resolutions of the House, and the warrant of the Speaker, under which Kilbourn was imprisoned, are in like manner void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority."

True it is that amongst the reasons assigned in this quotation from the court's opinion, *one* is that the court construed the resolution as authorizing the committee to, itself, assume the functions of the courts and to adjudicate on and collect the alleged indebtedness of Jay Cooke & Co. to the Government; and the court condemned this as an attempt, by the legislature, to invade the exclusive province of the judiciary. But this is not the *only*, nor, indeed, the *chief*, ground on which the court based the conclusion expressed in what we have above quoted from page 196 of the opinion.

If such invasion of the province of the judiciary were the real and the *only* ground for reaching the conclusion quoted from page 196, then that ground was, taken by itself, all-sufficient to defeat the jurisdiction of the House, and to render the imprisonment of Kilbourn unlawful. And, in that view, the great body of this most exhaustive opinion, and which great body went to show that "the cases in which" the House of Congress can punish for contempt "are very limited" (*p. 197*); and that "neither of the Houses possesses the general power of making inquiry into the private affairs of the citizen" (*p. 190*), becomes and is outside of the case and is the merest obiter.

This is palpably so, not only for the reason just stated, namely that, if the resolution was an attempt to bestow on a committee of Congress the powers of the judiciary, for that reason alone, and taken by itself, the resolution was void, and the jurisdiction of the committee was at an end, but also because the entire body of the opinion bearing upon the origin, nature and extent of the power

of the Houses to compel disclosures of private affairs, and to punish for contempt, *has no bearing* whatever upon the matter of the absence of power in the Houses to assign to one of the committees functions confided by the Constitution exclusively to the courts.

This remarkable opinion (and which, by the way, has received the approval of all the courts of the English-speaking world, and, we believe, of all the civilized and enlightened States), not only expressly affirms that the House had given to the committee no power to inquire into the private affairs of the citizen under said resolution—not only affirms that the Houses of Congress could give to the committee no power to inquire into such private affairs except in a "*very limited class of cases*" (*p. 197*), and "*under special circumstances*" (*bot. p. 197*)—not only expressly holds that, outside of such "limited class of cases," and such "special circumstances," the "House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested in the government of the country." (*top p. 195*);—not only holds that this "limited class of cases" and "special circumstances" took in only cases where the House resorted to the investigation *in order to enable it to execute one of its judicial functions, or, at most, some constitutional function* (*bot. p. 194; also p. 190, next to last paragraph*), but also proceeds, at great length, and with the most exhaustive research and learning, derived from the parliamentary history and law of England, from the common law of England, from the parliamentary law recognized in these States, and from a review of the prior decisions of the Supreme Court of the United States, including the case of *Dunn* v. *Anderson*, to establish these several and respective propositions.

Therefore, the great body of this entire opinion, and this vast array of authority and exhibition of learning, bearing upon these matters just enumerated, and decid-

ing them respectively, were all wholly out of place, and were worthless in the case if the court meant to exclude the questions from being asked upon the *sole* ground that the resolution invaded the exclusive province of the courts, and did not mean to base that decision *primarily* upon the special and limited powers of the Houses to pry into the private affairs of the citizen by compelling, under the pain and penalty of imprisonment, the exposure of such affairs.

Other Authorities and Points.

We now beg the indulgence of the court, in presenting to it some additional points and authorities, all going, in perhaps different degrees of directness, to support the main positions which we have presented above.

Regarding the jealousy and extreme watchfulness with which the courts guard against the insidious invasions of the rights secured by the Fourth and Fifth Amendments to the Constitution, and by the equivalent principles of the common law now embodied in said Amendments, we wish especially to impress upon our argument some of the utterances, touching this matter, of our Supreme Court.

In the case of *Boyd* v. *United States* (116 U. S., 635), Justice Bradley, in delivering the unanimous opinion of the court, states as follows:

"It may be that it is the obnoxious thing in its mildest and least repulsive form" (speaking of unreasonable searches, &c.); "but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the right,

as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

This, it will be remembered, is the opinion in which the court held the 5th section of the Act of the 22d of June, 1874 (18 Stats., 187), to be unconstitutional as violative of the Fifth Amendment.

In the case of *Counselman* v. *Hitchcock* (142 U. S., 580 *et seq.*), decided in 1891, this opinion in the case of *Boyd* v. *United States* is distinctly reaffirmed, and on page 582 what we have above quoted is again repeated and reaffirmed.

Of course, this is very familiar law; but in construing the provision of constitutional and statute law which protects these defendants from being compelled to disclose to the world their private affairs, these rules of interpretation can not be too earnestly impressed upon the attention of the courts; especially those provisions of the law which require the courts, in all cases, to refrain from compelling the throwing open, to the public gaze, private homes and private affairs "in cases and under circumstances where they could not be compelled to produce the same by ordinary rules of proceedings in chancery." (Sec. 724, Rev. Stats., U. S.; *Paine* v. *Warren*, 33 Fed. R., 358.)

Another point: We have occasionally grouped together the protections afforded by the Fourth and by the Fifth Amendments to the Constitution—this because they really intermingle and run into each other in the rights and protections which they furnish to the people. In regard to this

matter of the intermingling of these provisions of the two amendments, in the case of *Boyd* v. *United States* (*supra*), Justice Bradley says, in the opinion from which we have already quoted, as follows:

"We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an unreasonable search and seizure within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers, to be used in evidence against him, is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that the proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."

Again: The rights secured to the people by the Fourth and Fifth Amendments to the Constitution and those analogous provisions of the common law protective of liberty, from which those Amendments were, in substance, derived, are not restricted to the mere letter of the Amendments, as, for example, restricted to securing the "person" of the citizen, or "his home," or his "papers," or his "effects," and leaving all other private affairs unprotected.

On the contrary, Justice Bradley, in said case of Boyd, in commenting upon the scope of Lord Camden's judgment in the case of *Entick* v. *Carrington* (19 Howell's State Trials, 1029), rightly states the scope of that decision, and of the principles of law now embodied in the Fourth and Fifth Amendments, as follows, on page 630 (116 U. S.):

"The principles laid down in this opinion affect the *very essence* of constitutional liberty and security. They reach farther than the *concrete form of the case then before the court*, with its adventitious circumstances; they apply to *all invasions on the part of the Government and its employés of the sanctity of a man's home and the privacies of life.* It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the *essence of the offence;* but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence; *it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.* Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers, to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

"Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and unreasonable character of such seizures?"

Again, as bearing on the matter of the intrinsic and inestimable value of the securities given to private life and affairs by these Amendments, and by the analagous principles of the common law, and also as establishing that these protections are not confined to merely prohibiting compulsory production, exposure, or seizure of papers, books, homes, and other tangible objects, but likewise forbid the compulsory exposure, *by a party's own evidence*, of his private affairs, and this whether in a criminal or a civil proceeding, we now appeal to the concurring opinions of Justices Field and Sawyer in the case of *Pacific Railway Commission* (32 Fed. Rep., 249 to 269, inclusive). We present from the opinion of Justice

Field in that case, as found on pages 250, 251, the following extract, to each part of which we beg the careful attention of the court:

"In the recent case of *Boyd* v. *United States*, 116 U. S., 616, 6 Sup. Ct. Rep., 524, the Supreme Court held that a provision of a law of Congress which authorized a court of the United States in revenue cases, on motion of the Government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or that the allegations of the attorney respecting them should be taken as confessed, *was unconstitutional and void* as applied to suits for penalties or to establish a forfeiture of the party's goods. The court, speaking by Mr. Justice Bradley, said:

"'*Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government.* It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power, but it can not abide the pure atmosphere of political liberty and personal freedom.'

"*The language thus used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, but it is applicable to any such production of the private books and papers of a party, otherwise than in the course of judicial proceedings, or a direct suit for that purpose.* It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans.

"In his opinion in the celebrated case of *Entick* v. *Carrington*, reported at length in 19 How. State Tr., 1029, Lord Camden said:

"'Papers are the owner's goods and chattels; they are 'his dearest property, and are so far from enduring a 'seizure that they will hardly bear an inspection; and 'though the eye can not, by the laws of England, be 'guilty of a trespass, yet, where papers are removed and 'carried away, the secret nature of those goods will be an 'aggravation of the trespass, and demand more consider-

'able damages in that respect. Where is the written law 'that gives any magistrate such power? I can safely 'answer there is none; and, therefore, it is too much for 'us, without such authority, to pronounce a practice legal 'which would be subversive of all the comforts of society.'

"Compulsory process to produce such papers, *not in a judicial proceeding*, but before a commissioner of inquiry, is as subversive of 'all the comforts of society' as their seizure under the general warrant condemned in that case. The principles laid down in the opinion of Lord Camden, said the Supreme Court of the United States, 'affect the very essence of constitutional liberty and se-'curity. They reach further than the concrete form of 'the case then before the court with its adventitious cir-'cumstances; they apply to all invasions on the part of 'the Government, and its employés, of the sanctity of 'man's home and the privacies of life.'

"In *Kilbourn* v. *Thompson*, 103 U. S., 168, we have a decision of the Supreme Court of the United States that neither House of Congress has the power to make inquiries into the private affairs of the citizen; that is, to compel exposure of such affairs."

This opinion of Justice Field has been expressly approved and followed in *Interstate Commerce Commission* v. *Brimson* (54 U. S., 479), and in innumerable cases in the courts of the United States, and, so far as we can find, has been disapproved by no one of them.

Again, we wish to fix in the attention of the court certain suggestions, the result and outcome of which are to say that if the committee, in asking the questions set out in the indictments, was doing so outside of, or in excess of the jurisdiction and power given to it by the Senate resolution, then the refusal to answer was perfectly lawful, and was not a violation of section 102 of the Revised Statutes.

Stated in other words, our present proposition is that if the committee, in asking such questions demanding the disclosure of private affairs, went beyond the power and jurisdiction conferred upon it by the Senate resolu-

tion, then the indictments of defendants for refusing to answer are not defective as merely involving *error* in a matter of law; but, on the contrary, the asking of said questions, and the indictments in this case for refusal to answer, are matters *wholly outside, and in excess, of jurisdiction*, and are, therefore, absolutely void, and any imprisonment inflicted under a conviction in this case would be "false imprisonment," and the defendants would be entitled to discharge on *habeas corpus*.

This, precisely, is explicitly held in the Kilbourn case in summing up the opinion in that case in language which we have already quoted in another connection and which we here repeat, as follows:

"We are of opinion, for these reasons, that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the Speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority."

In the case of *Counselman* v. *Hitchcock* (142 U. S.), he was imprisoned for refusing to answer questions put to him by the grand jury in a prosecution for an alleged violation of the Interstate Commerce Law (*24 Stats., 379; 25 Stats., 855*); and which questions the Circuit Court had decided that he was obliged to answer, his refusal to answer being put upon the ground that his answers might tend to show that he himself had committed a crime. He applied to the said Circuit Court for a discharge from imprisonment under a writ of *habeas corpus*.

(*44 Fed. Rep., 268.*) Judge Gresham overruled his petition for discharge, and remanded him to custody of the marshal and discharged the writ of *habeas corpus*. He excepted to the order of the court refusing to discharge him, and took an appeal to the Supreme Court of the United States, and was admitted to bail pending such appeal. Thus this case reached the Supreme Court (*p. 553*), and the Supreme Court of the United States, on such appeal, discharged the prisoner on *habeas corpus*. Amongst the important things decided in the case was the following principle, stated in the third paragraph of the head note:

"The meaning of the constitutional provision" (Fifth Amendment) "is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution, but its object is to insure that a person shall not be compelled, when acting as a witness, in any investigation, to give testimony which may tend to show that he himself has committed a crime."

So far as relates to the matter of an imprisonment by orders, judgments or decrees made in absence of jurisdiction, being absolutely void in law, and as constituting false imprisonment, and also in so far as relates to such imprisonments not involving mere error, but being void owing to the absence of power or jurisdiction, and being relievable on *habeas corpus*, the same thing is found in a great multitude of cases decided by the Supreme Court.

Amongst these cases we may name *Wilson's Case* (114 U. S., 417); *Mackin's Case* (117 U. S., 348); *Bain's Case* (121 U. S., 1); *Stebold's Case* (100 U. S., 371); *Clarke's Case* (100 U. S., 399); *Lange's Case* (18 Wall., 163); *Nielsen's Case* (131 U. S., 176); *Snow's Case* (120 U. S., 274); *Roland's Case* (104 U. S., 604); *Fisk's Case* (113 U. S., 713); *Ayres' Case* (123 U. S., 443); *Sawyer's Case* (124 U. S., 200); *Cudhey's Case* (113 U. S., 280); *Ex parte Terry* (128 U. S., 289).

Interstate Commerce Commission *v.* Brimson, 154 U. S., 447.

Some use, not very important, was made in the court below of the case of *Interstate Commerce Commission* v. *Brimson* (154 U. S., 447), especially that part of the opinion (*pp. 470–2*) which insists upon an *implied* power in Congress to enact such legislation as is found in section 12 of the Interstate Commerce Act, set forth at pages 461, *et seq.*, of 154 United States Reports. This section gives to the Commission authority to demand complete information to carry out the objects of the act, authorizes it to execute the act, makes it the duty of the District Attorney, on the application of the Commission, to institute suits, under the direction of the Attorney General, for the enforcement of the provisions of the act, and for the punishment of violations thereof, gives the Commission power to require the attendance of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and in case of disobedience to a subpœna to invoke the aid of a court of the United States in requiring the attendance and testimony of witnesses and the production of books and papers, and gives the circuit courts of the United States, in the proper district, in case of contumacy or refusal to obey subpœnas, authority to issue an order requiring the carrier or other person to appear before the Commission, and to produce books and papers, if so ordered, and to give evidence touching the matters in question, and makes the failure to obey such order of the court liable to be punished *as contempt*, and provides that the tendency of the evidence to criminate the witness shall not excuse his testifying, but says that the evidence

shall not be used against him in any criminal proceeding, &c., &c.

Now, although some parts of this opinion may, especially owing to the dissent of three of the Justices and the failure of Justice Field to take any part in the decision, be still regarded as very doubtful law in the parts to which said dissent applies, yet we have no occasion to rely on such doubts, if any there be. So far as this case has any application to the case at bar, it is strongly and decidedly in favor of our demurrer—this because it expressly and strongly asserts and reaffirms all the doctrines which we have above quoted from the case *In re Pacific Railway Commission* (32 Fed. Rep., 241, 250); also the doctrines of *Counselman* v. *Hitchcock* (142 U. S., 547). This will be seen at pages 478, 479 and 480 (154 U. S.). The case, moreover, strongly reiterates and reaffirms all the doctrines which we have quoted from the cases asserting the inestimable value of the protection furnished to the citizen by the Fourth and Fifth Amendments to the Constitution, and the necessity of guarding and enforcing such rights in the courts and everywhere with ceaseless vigilance.

The substance of the entire case is, that owing to the grant to Congress of the power to regulate commerce between the States, there is carried with it the implied power to enact the provisions above recited as found in said 12th section, and that it was lawful for Congress to make it a contempt of court not to obey the order of the court, and to give testimony as there required; and that although the *Commission* could not punish as a contempt of its authority a refusal to appear and testify, yet Congress could make such refusal in the court to be an offense, or contempt, and could give the United States courts jurisdiction to try and punish such contempt, leaving, however, to the defendant the right to defend,

by showing that said refusal was justifiable owing to personal exemptions, &c., secured to him in that particular case by the Constitution (*p. 479*). This is the entire scope of the decision by the majority of the court, and surely it is unnecessary to say that it nowhere touches, adversely to these defendants, any part of the defense which they make in this case.

Section 102 of the Revised Statutes, Under Which These Indictments are Brought, Is an Attempt to Delegate to the Court the Power of the Houses to Punish for Contempt, and Is Palpably Unconstitutional for that Reason.

The grounds upon which we base this contention that section 102 of the Revised Statutes is unconstitutional are these:

1. It is plainly beyond the power of the two Houses of Congress to strip either one of the Houses of any of those powers and functions which are bestowed by the Constitution on the Houses respectively, either expressly or by implication.

2. It is conceded everywhere, and is thoroughly settled, that the power of the two Houses to punish for contempt comes to them as incidental to, and by virtue of, the functions which they derive from the Constitution. In other words, the power of the Houses to punish for contempt, whatever the extent of that power may be, is an incident of the powers they get from the Constitution to

be parts of the supreme legislature of the United States, to pass laws and to adjudicate matters over which the Constitution gives to them, respectively, the power of adjudication.

This power of the Houses is asserted everywhere, and is nowhere denied, not even in the Kilbourn case. (*See Cooley's Const. Lim., 4 ed., s. p. 133, t. p. 101–2–3.*) It is, therefore, thoroughly settled law that from the Constitution, as incidental to the powers thereby bestowed on each House, the Houses are endowed with the power and right to punish for contempt.

3. That this power to punish for contempt is inalienable, either by the separate action of the Houses, respectively, or by the joint act of the two Houses in the shape of a law, is equally plain and settled. Although the power to punish for contempt may be one of the implied powers derived from constitutional grants, it is none the less inalienable; because the implied powers granted by the Constitution stand, in that regard, precisely in the same predicament and class with the expressed powers.

Although neither one of the foregoing propositions would seem to require support by any citation of authority, yet we venture to suggest the following authorities on the various propositions just stated:

Regarding the want of power in Congress to deprive either of the Houses thereof of the functions conferred by the Constitution on them *separately*, it has been steadily held, from the beginning of this Government down, in the adjudications of the Houses of Congress, that no law of Congress can fetter, control, or bind the Houses as to the methods that they will pursue in judging of the election and qualifications of their members.

This is stated in McCrary on Elections, secs. 348-9;

Paine on Elections, secs. 974, 1003; in the case of *Williamson* v. *Sickels*, vol. 2 Election Cases, 288; *Harrison* v. *Davis*, *Id.*, 241, and in numerous other cases. And, so far as we can find, has never been questioned or doubted.

In these cases what the Houses have held in regard to the force of laws providing for the method of conducting contested elections is that they *have not the force of laws*, are not *binding* on the Houses; can not, by Congress, be made binding on them; and are admitted, in the practice of the Houses, merely as convenient and useful *rules* to be observed as far as convenient and practicable in conducting contested elections.

In regard to the provision authorizing each House to punish its members for disorderly conduct, Story, in section 837 of his work on the Constitution, says:

"If the power did not exist, it would be *utterly impracticable* to transact the business of the nation, either at all, or at least with decency, deliberation and order. The humblest assembly of men is understood to possess this power, and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory unless it was coupled with a power to *punish* for disorderly behavior or disobedience to those rules."

The indispensable and inalienable character of this power is thus asserted and vindicated, and to say that one of the Houses, or the two Houses, can divest either House of this power is simply absurd.

In regard to the general power of the Houses to punish for contempt, Story (sec. 845) says:

"It is remarkable that no power is conferred to punish for any contempts committed against either House, and yet it is obvious that unless such a power, to some extent, exists by implication, it *is utterly impossible for either House to perform its constitutional functions.* For instance,

how is either House to conduct its own deliberations if it may not keep out or expel intruders?"

If such be, as it undoubtedly is, the intrinsic value and importance of this power to punish for contempt, namely, that it is utterly impossible for either House to perform its constitutional duties in the absence of said power, then to assert that either House by itself, or the two Houses together, or the President and the two Houses, can abolish such power, is to assert the right to commit a *felo de se*, and to put an absolute end to the Government. Therefore, it is not possible for either House, or the two Houses, to divest itself or themselves of this power.

Again, in Note 4 to section 1505 of Story on the Constitution, it is asserted that Congress can not limit or impose restrictions upon the President's *power to pardon*. This is thoroughly settled in such cases as—

United States v. *Klein*, 13 Wall., 128;
Armstrong v. *United States*, 13 Wall., 154;
Pargoud v. *United States*, 13 Wall., 156;
Ex parte Garland, 4 Wall., 380.

Surely, if it is beyond the power of Congress to impair, restrain, limit, or otherwise control, that distinct prerogative of the President, the pardoning power, it must, upon the same reasons and principle, be equally beyond the power of the Houses of Congress, and of each of them, respectively, to restrain or limit those separate functions of the Houses, respectively, which are conferred upon them by the Constitution, including this indispensable power to punish for contempt.

Again, in section 1503 of Story on the Constitution, it is asserted that the President has no power to pardon an offense committed against one of the Houses of Congress. Story says:

"It would seem to result from the principle on which the power of each branch of the legislature to punish for

contempts is founded, that the executive authority can not interpose between them and the offender. The main object is to secure a purity, independence, and ability of the legislature adequate to the discharge of all its duties. If they can be overawed by force, or corrupted by largesses, or interrupted in their proceedings by violence, without the means of self-protection, it is obvious that they will soon be found incapable of legislating with wisdom or independence. If the executive should possess the power of pardoning any such offender, they would be wholly dependent upon his good will and pleasure for the exercise of their own powers. Thus, in effect, the rights of the people entrusted to them would be placed in perpetual jeopardy. The Constitution is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to punish for contempts. The latter arises by implication; and, to make it effectual, the former is excluded by implication."

Citing—

Rawle on the Constitution, ch. 17, p. 177.

So here again, if, for the important consideration here stated, it is prohibited to the President, by means of the exercise of that unrestricted power to pardon, to in any way restrict, limit, or interfere with a punishment inflicted by one of the Houses under the power of the respective Houses to punish for contempt, then it must be, for the same reasons, equally beyond the power of the Houses, either acting separately, or by means of an act of Congress, to restrict, impair, or interfere with this vital and indispensable function secured by the Constitution to the respective Houses to punish for contempt.

This position, that this statute, in undertaking to abrogate the powers of the Senate to enforce obedience to its lawful orders and to punish for contempt, is unconstitutional, is no invention of ours. Even as late as the 30th of May, 1894, in the Senate, when it was proposed to certify these refusals to the Grand Jury, it was strenuously opposed by the ablest lawyers in the Senate on the ground,

amongst others, that the statute was unconstitutional. One of the Senators who opposed it was Senator Hill, of New York. What he said will be found at the middle of the first column of page 6496 of the *Congressional Record* of May 30, 1894, where he condemns the statute as unconstitutional in these words:

"It" (the statute) "does not allow the Senate to judge of the pertinency of that question. It assumes to place the whole power of this body under the control of a committee, and refuses to permit the Senate to supervise the action of that committee. *The Senate, under the Constitution, can not abdicate its powers. No statute of that kind can stand the test of constitutional construction.*"

And Senator Hoar, certainly one of the ablest constitutional lawyers of the Senate, on page 7853 of the *Congressional Record* of June 22, 1894, says to the same effect with that above quoted from Senator Hill, as follows:

"Mr. Hoar. It seems to me, if I may be pardoned for a sentence, *that the Senate is laying down its constitutional authority when it takes the view that its power to enforce obedience to its lawful order to a witness who is brought before one of its committees depends on the action or non-action of a grand jury, or any officer whatever. If we have the constitutional right to bring the witnesses here to testify, we have the constitutional right to compel them to answer, and we are degraded if we do not do it.*"

There is much else in this debate showing that a considerable proportion of the legal learning of the Senate regarded the statute as unconstitutional.

These considerations now stated thoroughly establish the proposition that no power exists anywhere, short of blank revolution, to take away from, or limit, or impair, those constitutional functions which are given to the Houses of Congress, respectively, for the purpose of enforcing obedience to the lawful orders of the Houses and for the purpose of preserving order, &c., by means of the exercise of the power to punish for contempt.

Of course, this does not mean that Congress possesses no power to *define*, in doubtful classes, what shall be regarded as contempt of the courts. It only means that whatever is by statutes or by universal principles of the parliamentary law contempt can not be taken from the Houses respectively by any authority.

This being, as seems to us, incontestibly established, it becomes necessary next to inquire whether section 104 of the Revised Statutes contemplates and intends to surrender to the authorities of the Criminal Court in this District the sole and exclusive jurisdiction and power to punish for contempt in those cases which said section 104 requires to be certified to the District Attorney for this District; or whether said section, if fully executed according to its plain requirements, must and does operate as a surrender of the power of the respective Houses themselves to punish as contempts the acts so required to be certified to the District Attorney.

It is, we submit, demonstrated by the considerations and authorities which we have above cited, that any statute which can not be *fully* executed, according to its terms, without interfering with, restricting, or impairing the power of the Houses respectively to freely, promptly, and at all times, and under all circumstances, exercise their respective constitutional functions given them in order to preserve order, and to enforce obedience, by summary infliction or punishment for contempt, can not be a valid law.

It can not be a valid law, because its full enforcement does, by necessity, involve either a full or at least a partial surrender of the inalienable power of the Houses to punish for contempt in that given case where such full enforcement of such statute renders the punishment by the Houses respectively impossible.

This proposition is as plain and as incapable of being successfully controverted as is any that can be stated or

conceived. But it is equally plain that the full execution of the provisions of section 102, under which these indictments are framed, and of said section 104, does contemplate and does require the *immediate and full* surrender of the alleged delinquent, so refusing to answer questions, to a wholly distinct and independent jurisdiction and custody, to wit, to the Criminal Court of this District—a custody with which the Houses of Congress *can not interfere*, a custody which may continue for indefinite years and can not continue less than a month in case of conviction, a custody which section 104 *invites and urges* the said court and its grand jury to *immediately* take and to retain until the end of the imprisonment for which section 102 provides, and which, as we have just stated, may continue for years.

It is surely plain, by the very face and express terms of sections 102 and 104, that they do not contemplate or permit, in a case where they require a delinquent to be certified to the District Attorney, that that certification shall be delayed until the House has punished the delinquent for his refusal to answer, and then require such certification after such infliction of punishment by the House.

On the contrary, it manifestly contemplates and requires the substitution of the punishment provided for in section 102 in lieu and place of any which the House might otherwise inflict. And so it has been held by the Supreme Court of this District. We cite the following on this point from note 3, page 164, of Cooley's Constitutional Limitations (4th ed.), where the author says, in regard to what are now sections 102 and 104 of the Revised Statutes, as follows:

"In the matter of Kilbourn, May, 1876, Chief-Justice Cartter, of the Supreme Court of the District of Columbia, discharged on *habeas corpus* a person committed by the House of Representatives for a contempt in refusing to testify, holding that, as the refusal was an indictable

offence by statute, a trial therefor must be in the courts and not elsewhere. If this is correct, the necessities of legislation will require a repeal of the statute; for if, in political cases, the question of punishment for failure to give information must be left to a jury, few convictions are to be expected, and no wholesome fear of the consequences of refusal."

We submit that, so far as relates to the point that these sections *intend* to delegate to the Criminal Court of this District the exclusive jurisdiction and power to punish as contempt the acts denounced in section 102 of the Revised Statutes, and to deprive the Houses of Congress of their constitutional functions in that particular class of cases, this decision of Chief-Justice Cartter here cited was and is right; and we further submit, in regard to this extract from Cooley, that the distinguished author is right in his intimation, there expressed, that such attempted delegation and transfer is unconstitutional and void; or, if he does not intimate that much, he does expressly aver that the law, because of its pernicious character, must be repealed.

Now, it is as evident as is the axiom that a body can not occupy different spaces at the same time, that sections 102 and 104 can not be executed at all, and yet the Houses retain and exercise the right and power, or the possibility, of punishing the delinquent for contempt during the execution of the said provisions of sections 102 and 104.

Please observe that punishments for contempt are always *summary*—always required to be administered promptly, on the commission of the offense, and always require the personal presence of the accused in being tried and punished. How is it possible that this state of things can co-exist along with that immediate prosecution so peremptorily and explicitly *ordered* by sections 102 and 104?

No; the fact most palpably is that, as already remarked, these sections contemplate and admit of no such double prosecution. They contemplate and admit of but one prosecution in cases covered by said two sections, and that in the Criminal Court of the District. They, therefore, involve and require the surrender, in the class of cases where said certificate to the District Attorney is required, of the power of the House, so certifying, to punish as contempt that particular act so certified; and they require the delegation of this part of the constitutional jurisdiction of the Houses, respectively, to punish for contempt, to the Criminal Court of this District.

In this connection it is proper to direct the attention of the court to the fact that although this statute, approved the 24th of January, 1857, has now been on the statute books for nearly forty years, yet no case has ever been prosecuted under it, and but one indictment found under it, in which the prosecution was in effect abandoned.

Should it be urged in reply to what we have said regarding the constitutionality of sections 102 and 104, taken as a whole, that the courts will never give to a statute a meaning which renders it unconstitutional, if it is capable of being construed in such a way as to effectuate the intention of the legislature and yet have a constitutional meaning, then our reply to such position is as follows:

The principle which asserts that a constitutional sense will always be given to a statute instead of an unconstitutional one, when it admits of such constitutional sense, is subject to the qualification which, in section 180 of Endlich on Statutes, is stated in these words:

"But the rule above stated does not warrant the avoidance of unconstitutionality of a statute by forcing upon its language under construction a meaning which, upon a fair test, is repugnant to its terms" (citing *French* v.

Teschemaker, 24 Cal., 518; *People* v. *Railroad Co.*, 35 Cal., 605; *Bigelow* v. *Laureed Co.*, 27 Wis., 478; *Bishop W. R. L.*, Sec. 90.) "Where the language will not fairly bear a construction consistent with the Constitution, the courts can only refuse to enforce the act."

Citing—

Attorney General v. *Eau Claire*, 37 Wis., 400.

Precisely the same principle above quoted from Endlich we find stated in the case of *Sprague* v. *Thompson* (118 U. S., 90–4–5). In the syllabus it is stated thus:

"If a clause in a statute which violates the Constitution can not be rejected without causing the act to enact what the legislature never intended, the whole statute must fail."

In that case the courts of Georgia had undertaken to sever the provisions of section 1512 of the Code, regarding the pilotage of coasting vessels, so as to enforce the part that did not conflict with the Constitution and laws of the United States, and to let the rest of the section perish. Justice Matthews, in the opinion, in objection to this decision, says (bot. p. 423):

"But the insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the legislature of Georgia, the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are therefore constrained to hold that the provisions of section 1512 of the Code of Georgia can not be construed so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes."

And see also *U. S.* v. *Reese* 92 U. S., 120 U. S., and cases there cited.

This, therefore, is the law in regard to the right to resort to a constitutional interpretation of a statute where the text of the statute apparently conflicts with the Constitution. The only possible interpretation of these two sections, 102 and 104, which divests them of their apparent assignment, to the Criminal Court of this District, of the power of the houses to punish for contempt, is to say that the sections may be construed to mean that the certification to the District Attorney may be delayed until after the House has punished the same act for contempt—that the statute does not say *when* the certification to the District Attorney shall occur, and may, therefore, very well be construed as intending to postpone such certification until after the House has punished for contempt.

We have already seen that it is impossible to hold that the intention of the law was to *first* have the accused certified to the District Attorney, and the House *afterwards* take up the matter of punishing as contempt for the same refusal. This is impossible, because after, by means of the certificate, the custody of the accused is surrendered to the District Attorney, the Houses of Congress can not interfere with that custody, and, therefore, can not submit the accused to punishment for contempt after certification to the District Attorney.

We are, therefore, brought to the single question: Will it be in conformity with the intention of these sections to give them the meaning that the certificate shall not, or need not, be made until after the House has punished the refusal as a contempt? We submit that giving this statute such a construction is plainly to defeat its intention; and this, as held in the case just cited of *Sprague* v. *Thompson* (*supra*), is not permissible in order to avoid the unconstitutionality of the statute.

Section 104 says:

"*Whenever* a witness summoned as above mentioned in section 102 fails to testify, *and the facts are reported to either*

House, the President of the Senate, or the Speaker of the House, as the case may be, *shall* certify the fact, under the seal of the Senate or House, to the District Attorney for the District of Columbia, whose duty it shall be to bring the matter before the Grand Jury for their action."

This section, therefore, in express words, enacts that "*whenever*" a witness summoned to testify fails to answer, *and the facts are reported to the House, then* the presiding officer shall certify the matter to the District Attorney. These words, taken together, show two things, namely:

1. That there can be no punishment for contempt prior to the time pointed to by this word "whenever," because it is impossible that the delinquent can be punished by the House for contempt *prior to any report* of his refusal to that House.

Therefore the statute, by this provision, requires the certification to the District Attorney to be made "whenever" the *first* report of the failure to answer is made to the House. This excludes every possibility of there having been, *prior to the report here spoken of*, any punishment for contempt, because there can be no punishment, by the House, prior to said report of the delinquency to the House.

2. The other thing shown by these words is that *as soon as* there has been a refusal to testify *and* a report of the facts to the House, *then* the certificate of the prosecuting attorney of the District is to be made, and the custody of the derelict is thereby surrendered to the Criminal Court.

The meaning, according to all the dictionaries, and according to the universal popular signification of that word, of the word "whenever," is "at whatever time." The requirement of the statute, therefore, as to the *time*

of certification, is the same as if it had said, "when a "refusal occurs, and a report of such refusal is made to "the House by the committee, *then, and immediately there-* "*upon*, the certificate to the District Attorney shall be "made."

Hence, it is impossible, without defeating the intention of the Legislature, as expressed in said sections 102 and 104, to hold that these sections *retain* in the House making the certificate the power to punish for the alleged contempt, notwithstanding, *and after* the making of said certificate. These sections are, therefore, void as incapable of any operation, except that of operating to defeat the constitutional provision which endows the Houses of Congress with the *inalienable power* to punish for contempt whatever acts amount to a contempt of the authority of the House.

We respectfully submit that the defendant is entitled to be discharged.

S. SHELLABARGER,
J. M. WILSON,
Att'ys for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1894.

Original No.....

Ex Parte: In the matter of ELVERTON R. CHAPMAN,

Petitioner.

BRIEF IN REPLY TO BRIEF SUBMITTED BY THE SOLICITOR GENERAL.

SAMUEL SHELLABARGER,
JEREMIAH M. WILSON,
GEORGE F. EDMUNDS,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

Original, No. —.

EX PARTE: IN THE MATTER OF ELVERTON R. CHAPMAN, PETITIONER.

Brief in Reply to Brief Submitted by the Solicitor General.

In order that the court may understand the precise situation of this case, we make the following brief statement:

1. The defendant was indicted under § 102, R. S. U. S., for having refused to answer certain questions set forth in the indictment, Exhibit A, propounded to him by a committee of the Senate.

2. He demurred to this indictment, on the grounds, among others, that said § 102, is unconsitutional and void, and; therefore, the court had no jurisdiction to try him on said indictment; that, also, under the resolution of the Senate, upon which the committee was proceeding, the committee had no authority to ask him the questions, was without jurisdiction in the premises, and that the court was without jurisdiction to try him on an indictment based upon such refusal; and, also, that § 102 is

unconstitutional, because it was an abdication or surrender of the powers of the Senate in respect of contempts of its authority and power.

3. This demurrer was overruled by the justice holding special term for criminal business of the Supreme Court of the District of Columbia.

4. Thereafter an appeal was allowed, upon special application made therefor, by the Court of Appeals of the District of Columbia, from said order of the special term of the Supreme Court of the District of Columbia, overruling said demurrer.

5. Upon hearing had upon said appeal, the said Court of Appeals affirmed the judgment and order of the lower court, overruling said demurrer; and remanded said case for further proceedings.

It will be seen, therefore, that this question as to the jurisdiction of the Supreme Court of the District of Columbia has already been passed upon by that court, and, also, by the Court of Appeals; and consequently it is henceforth a mere formality to present that question to these tribunals; and, hence, if the petitioner may avail himself of the writ of *habeas corpus* to test this question of jurisdiction, there is no substantial reason why it may not be permitted to him now, instead of waiting until a trial before the Supreme Court of the District, and another appeal to the Court of Appeals, which could only result in a repetition of what has already been done.

I.

We do not dispute the first point made in the brief of the Solicitor General.

II.

We reply to subdivision (*a*) of the second point contained in said brief, alleging that the unconstitutionality of said § 102 is too doubtful to justify the issuance of the writ of *habeas corpus*,—

1st. That that question is the very one on which we have a right to be heard, it being the point in dispute;

2d. That the unconstitutionality of said § 102 is no more doubtful than is the proposition that Congress can not abdicate one of the functions conferred by the Constitution and which can not be abdicated without endangering the very existence of the Government (see Story, bot. p. 65, top p. 67, petitioner's printed brief herein);

3d. The alleged unconstitutionality of § 102 is not the only thing in the case which defeats the jurisdiction of the court; that jurisdiction is defeated equally by the two considerations urged in the case in the court below, and in our brief for the writ, (*a*) that the Senate could not confer upon the Committee the power to make the search into the private affairs of petitioner, except where the Senate showed, in its resolution authorizing the investigation, that the investigation was for the purpose of aiding Congress in the exercise of its judicial functions, which the Senate resolution does not do; and (*b*) that the terms of the Senate resolution not only do not affirm that such aid was sought in passing said resolution, but show the opposite;

4th. It is no answer to say that petitioner did not claim *privilege* on the ground that the answer would tend to criminate him; the unconstitutionality of § 102 being based upon the proposition that § 103 is unconstitutional, for the reasons stated in the cases from this court, cited at page 9 of the printed petition herein; and, therefore, § 103 herein can not be executed, because it is intrinsic-

ally void, and it being inseparable from § 102, § 102 can not be held valid and enforceable in the absence of § 103, for the reasons stated at bottom page 8 and top page 9 of printed petition herein, this being rested upon the principle quoted (on the 8th page of said petition) from the case of *Sprague* v. *Thompson*, 118 U. S., 91, last paragraph of head-note; and § 102 independent of § 103 is unconstitutional, because it without limit or qualification compels a party to answer whether the answer would criminate him or not, and it is not in the power of a court to eliminate from the statute, so as to make it only apply to cases within the power of Congress.

See Trade-mark Cases, 100 U. S., pp. 96–98, and cases cited.

In reply to subdivision (*b*) of said paragraph two:

The case there cited, *In re* Frederick, 149 U. S., 70, was one where the party had been convicted in a State court, and that conviction affirmed in the Supreme Court of the State, after which he applied to the Circuit Court of the United States for the writ of *habeas corpus*, and, the writ being denied him, he brought the case to this court by appeal from the decision of the Circuit Court refusing the writ of *habeas corpus;* and this court held that he might have taken a writ of error directly to the State court, and that under the circumstances of the case that was his proper remedy. And it will be further observed (p. 77 of said case), that this court gave as a reason for refusing the writ of *habeas corpus* and requiring him to proceed by writ of error, that under the latter the State court would be left "to deal with him thereafter within the limits of proper authority, instead of discharging him by *habeas corpus* proceedings, and thereby depriving the State of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged."

In this same case (p. 78) this court recognized that the proceeding might be by *habeas corpus*, although a writ of error could be prosecuted, and cites *Medley, petitioner* (134 U. S., 160), and adds that " in the absence of special facts and circumstances it is the better practice to resort to the writ of error instead of the writ of *habeas corpus*," where the prisoner claims that the judgment of the State court violates his rights under the Constitution.

If this same rule is applied as to cases arising in the Federal courts, as contradistinguished to the State courts, then there are special facts and circumstances in this case because of which the writ of *habeas corpus* should be granted, namely, that the vital question in the case has already been decided, as above stated, and there is no such reason existing in this case as was given in the case above referred to for the refusal of the writ, and requiring the party to resort to writ of error, to wit, that of so dealing with the case as that the authorities might take some other steps, etc. In this case that is impossible, because if the act is unconstitutional no other proceeding can be taken.

Hence, this case of Frederick (*supra*), clearly has no material bearing upon the case at bar, because of the total dissimilarity between the facts of the two cases.

But we submit that there is no writ of error from this court to the Supreme Court of the District of Columbia, or to the Court of Appeals of the District of Columbia, in a *criminal* case.

This proposition is submitted upon the authority of the cases—

Farnsworth v. *Montana*, 129 U. S., 112, *et. seq.*;
In Re Heath, 144 U. S., 92;
Cross v. *U. S.*, 145 U. S., 571;
In Re Schneider, 148 U. S., 157.

By reference to these authorities it will be seen that this court has decided under the act of 1885, which is

precisely like, word for word, § 8 of the act creating the Court of Appeals of the District of Columbia (quoted at pp. 2 and 3 of the Solicitor General's Brief), that a writ of error from this court is not available in a criminal case, as applicable to the District of Columbia. (*Farnsworth* v. *Montana*, 129 U. S., 112, 113.)

III.

To the third proposition in said brief, that the real position of petitioner is that the Committee did not have lawful authority to make the inquiry, the reply is—

1st. That it is not an accurate statement of petitioner's position;

2d. That this is only one of the several grounds on which the absence of jurisdiction is rested, the other grounds being those stated at pages 5, 6, 7, 8, 9, and 10 of the petition herein;

3d. It is impossible rationally to assert that because the court below decided it had jurisdiction or decided that the Senate had jurisdiction, that, therefore, and, thereupon, if, as a matter of fact and law, the Senate was without jurisdiction, such decision of the court below asserting jurisdiction is conclusive on the question of jurisdiction upon this and all other courts. Such a holding is an end of all inquiries on *habeas corpus*, into an imprisonment ordered by a court below in the absence of power and jurisdiction so to order;

4th. This identical question is decided in the case of *Kilbourn* v. *Thompson* (103 U. S., 196), where the court states what we quote at bottom p. 50 and top p. 51 of our brief filed in support of this application. There the court held that because the resolution of the House was in excess of its authority and beyond its jurisdiction, therefore, every step against Kilbourn resulting in his imprisonment was absolutely void and his imprisonment was a false im-

prisonment. The principle there asserted is here equally applicable and conclusive;

5th. Unless the Senate Committee had jurisdiction to make the inquiry, it is impossible for the court to have jurisdiction predicated upon that inquiry.

Our contention is that no such jurisdiction had been given to the committee, and, therefore, this is a matter which it is within the jurisdiction of this court to determine, and while it may be as claimed by the Solicitor General, that it is a question to be determined by the Supreme Court of the District of Columbia, since it is a question involving the jurisdiction of the court, the ruling of the Supreme Court of the District on that subject may be reviewed by this court.

Much of what is stated in this reply-brief is stated on authorities cited at pages 2, 3, 4, 4a, 4b of our brief, filed in support of our petition for writ of *habeas corpus*, to which pages we refer as additional reply to the brief of the Solicitor General.

S. Shellabarger,
J. M. Wilson,
Geo. F. Edmunds,
Atty's for Petitioner.

In the Supreme Court of the United States.

October Term, 1894.

Original, No. —.

Ex parte: In the matter of Elverton R. Chapman.

OBJECTIONS TO THE APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

Original, No. —.

EX PARTE: IN THE MATTER OF ELVERTON R. CHAPMAN.

OBJECTIONS TO THE APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

1. The writ will not issue unless the court under whose warrant the petitioner is held is without jurisdiction. It can not be used to correct errors. *Ex parte Watkins*, 3 Pet., 193; *Ex parte Parks*, 93 U. S., 18; *Ex parte Yarbrough*, 110 U. S., 651; *In re Coy*, 127 U. S., 731, 756. The later cases really add nothing to the lucid statement of the principle made by Chief Justice Marshall in *Ex parte Watkins*, which was a petition for a *habeas corpus* to discharge the petitioner from confinement under a judgment of the circuit court of the District of Columbia.

2. The petitioner, recognizing this rule, insists that the supreme court of the District of Columbia, under whose

warrant he is held, is without jurisdiction, because Rev. Stat., sec. 102, upon which the indictment is based, is unconstitutional. I submit—

(*a*) That there is not sufficient doubt of the validity of that section to warrant the issuing of the writ. The claim that Rev. Stat., sec. 103, is unconstitutional, does not affect the validity of a prosecution based upon sec. 102, where, as at bar, no privilege was claimed by the accused upon the ground that an answer to the question put by the Senate committee would incriminate him.

(*b.*) If Rev. Stat., sec. 102, is unconstitutional, the petitioner has a remedy by writ of error. If so, he must resort to that writ, and will be denied relief by *habeas corpus*. *In re Frederich, petitioner*, 149 U. S., 70.

Prior to the act of February 9, 1893, c. 74, 27 Stat., 434, establishing a court of appeals for the District of Columbia, this court had no jurisdiction to review criminal cases in the supreme court of the District of Columbia, *In re Heath, petitioner*, 144 U. S., 92; *Cross* v. *United States*, 145 U. S., 571; but it would seem by section 8 of that act that the judgments of the supreme court of the District, reviewable in the first instance in the court of appeals, may be reviewed ultimately in this court, even in criminal cases, where the validity of a statute of the United States is drawn in question.

The section is as follows:

> SEC. 8. That any final judgment or decree of the said court of appeals may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of

costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States.

3. The real claim of the petitioner is that the Senate committee did not have lawful authority to make the inquiry which is the basis of the indictment. But that is the very question to be determined by the supreme court of the District of Columbia, and the objection raised by the petitioner is really to the authority of the Senate, and not to the jurisdiction of the court. But nothing short of want of jurisdiction in the *court* by whose warrant he is held will justify his release on *habeas corpus*.

Respectfully submitted.

LAWRENCE MAXWELL, JR.,
Solicitor-General.